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Office Supreme Court, U. S.
FILED
NOV 21 1917
JAMES D. MAHER,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 27, Original.

EX PARTE FRANK M. SLATER, PUBLIC ADMINISTRATOR OF THE CITY OF ST. LOUIS, MISSOURI, AS SUCH IN CHARGE OF THE ESTATE OF DAVID T. BOMAR, DECEASED, PETITIONER.

PETITION FOR A WRIT OF MANDAMUS.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Counsel for Petitioner.

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EX PARTE FRANK M. SLATER, PUBLIC ADMINISTRATOR OF THE CITY OF ST. LOUIS, MISSOURI, AS SUCH IN CHARGE OF THE ESTATE IN MISSOURI OF DAVID T. BOMAR, DECEASED.

PETITION FOR A WRIT OF MANDAMUS.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Frank M. Slater, having first obtained leave so to do, respectfully informs Your Honors that he is the duly elected, qualified, and acting public administrator of the city of St. Louis, Missouri.

That on the 17th day of July, 1916, and for a long time prior thereto, there was pending in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a certain proceeding in equity, wherein one Morgan Jones was complainant and the Union Electric Light and Power Company, a corporation, and others, were defendants; that theretofore such proceedings had been

taken and had therein that the complainant had recovered a decree for the payment of a large sum of money to himself and other persons, who had by leave of court become intervenors in the said cause; and that out of the said sum so recovered by the complainant and the said intervenors there had been set aside and awarded to the solicitors for the complainant and the interveners a sum of money amounting to ninety-five thousand seven hundred and seventy and no/100 ($95,770.00) dollars; that the said solicitors, among whom was one David T. Bonar, then and for a long time prior thereto a citizen and resident of the State of Texas, came into dispute among themselves as to the just and proper division of the said fund or sum of money set aside for counsel fees as aforesaid, and were unable to agree among themselves as to the relative proportion of each of them in and to the aforesaid sum of money; that thereupon the said dispute and controversy between the said solicitors, and the determination of the just and equitable division of the said fund among them, was by the order of the said court, the United States District Court for the Eastern Division of the Eastern District of Missouri, referred to a master in chancery for hearing and determination; that the said master in chancery thereafter proceeded to hear evidence upon the said controversy, and having heard and considered the same did, on the 13th day of July, 1917, report to the said court and to the Honorable David P. Dyer, who then was and still is the judge presiding in the said court, his findings and conclusions thereon; that within the time limited therefor, by law, each of the said solicitors, including the said David T. Bonar, filed exceptions to the report of the said master in chancery, wherein and whereby each of them claimed and contended that the portion or share of the aforesaid fund awarded to each of the others was excessive and ought to be cut down or diminished, and that the portion awarded and adjudged to him was insufficient and should be increased, and that the said exceptions were specially directed against the amount awarded by

the said master in chancery to the said David T. Bomar out of the said fund, and that if the same should be sustained or otherwise favorably acted upon, they would operate to cut down or diminish the amount which the said Bomar would receive out of the said fund, whereby the interest of the said Bomar in the said fund became and was in jeopardy; that the said exceptions are still pending in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and that the interest of the said Bomar in the said fund remains in controversy and dispute and in jeopardy, and will so remain until the said exceptions are finally determined.

That about the 17th day of July, 1916, the aforesaid sum of money adjudged and awarded to the solicitors for the complainant in the said cause of Morgan Jones, complainant, *vs.* Union Electric Light and Power Company and others, defendants, was by the order and direction of the said court, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, put into the hands of the clerk of the said court, and by the clerk of the said court was deposited in the State National Bank, a banking institution duly incorporated under the laws of the United States and having its office and place of business in the city of St. Louis, Missouri, and that the said fund was at all times thereafter, and still is, on deposit in the said bank.

That thereafter, to wit, on the 22d day of September, 1917, the said David T. Bomar, who was then a citizen of the State of Texas, died at his domicile in the said State, leaving a last will and testament duly executed and attested according to the laws of the State of Texas, which said will has not yet been admitted to probate by the court of the State of Texas having jurisdiction of such matters, but which has been filed in the office of the clerk of the said court; that on the 26th day of September, 1917, this petitioner being informed of the death of the said Bomar and

of his interest in the said fund so deposited in the State National Bank in the city of St. Louis as aforesaid, and that there were no heirs or other persons of kin to the said Bonar competent under the laws of the State of Missouri to administer upon so much of the estate as might be located in Missouri, did, in his official capacity, file notice in the office of the clerk of the Probate Court of the city of St. Louis, Missouri, which under the laws of the State of Missouri is the court having sole and exclusive jurisdiction of the granting of letters testamentary and of administration upon the estates of deceased persons, that he had taken charge of the estate of the said Bonar in Missouri in his official capacity and under his official bond; that by the law of the State of Missouri (section 302, Revised Statutes of 1909), now and then in full force and effect, it is provided as follows, to wit:

> "*Duty of Public Administrator to Take Charge of Estates, When.*—It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and estate of all insane persons in his county, in the following cases: First, when a stranger dies intestate in the county without relations, or dies leaving a will, and the executor named is absent, or fails to qualify; second, when persons die intestate without any known heirs; third, when persons unknown die or are found dead in the county; fourth, when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same; fifth, when any estate of any person who dies intestate therein, or elsewhere, is left in the county liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heirs in this State; sixth, the persons of all minors under age of fourteen years whose parents are dead and who have no legal guardian; seventh, the estates of all minors whose parents are dead, or, if living, refuse or neglect to qualify as curator, or, having qualified, have been removed, or are, from any cause,

incompetent to act as such curator, and who have no one authorized by law to take care of and manage their estate; eighth, the estates or person and estate of all insane persons in his county who have no legal guardian, and no one competent to take charge of such estate, or to act as such guardian, can be found, or is known to the court having jurisdiction, who will qualify; ninth, where from any other good cause, said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost."

That thereafter, to wit, on the 5th day of October, 1917, the same being one of the days of the September, 1917, term of the said Probate Court of the city of St. Louis, Missouri, the said Probate Court, having been advised of the action of this petitioner in his said official capacity in taking charge of the estate in Missouri of the said David T. Bomar, deceased, as aforesaid, did in open session make and enter of record an order and judgment in words and figures as follows, to wit:

IN THE PROBATE COURT WITHIN AND FOR THE CITY OF ST. LOUIS, STATE OF MISSOURI, SEPTEMBER TERM, 1917.

Friday, October 5, 1917.

Estate of David T. Bomar.

Order to Administer.

State of Missouri,
City of St. Louis, ss:

It appearing to the Court that David T. Bomar, deceased, late a resident and citizen of the State of Texas, died on the 22nd day of September, 1917, leaving an estate in the city of St. Louis, Missouri, consisting of an interest in a sum of money now on deposit in the State National Bank of the said city of St. Louis, and that the extent of the interest of the said deceased is dependent upon the result of certain litigation now pending, and that by reason thereof the same is liable to be diminished or otherwise impaired, wasted or injured unless there be some person duly authorized to appear for and represent the interest of the said deceased in the said litigation; that said deceased left no widow, devisee, legatee or other person in the State of Missouri capable of administering. And it further appearing to the court that it is necessary and desirable that administration be had on the said estate in Missouri, and that Frank M. Slater, Public Administrator of the said city of St. Louis, has in his official capacity filed in the office of the Clerk of this court a notice that he has taken charge of the estate of the said David T. Bomar, deceased, in Missouri, it is ordered and decreed that the said Frank M. Slater, Public Administrator as aforesaid, be and he is hereby directed to

take charge and possession and administer upon the estate of the said deceased in the city of St. Louis, Missouri."

That the said order and judgment has now become final and is in full force and effect; that by section 34, of article VI, of the Constitution of the State of Missouri, it is provided that the Probate Court shall have jurdisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by administrators, curators and guardians, and also jurisdiction over all matters relating to apprentices. That in pursuance of the foregoing constitutional authority the legislature of the State of Missouri enacted and provided concerning probate courts as follows, to-wit: Section 4055, Revised Statutes of 1909.)

> "*Their Jurisdiction*—Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by administrators, curators and guardians, and over all matters relating to apprentices; and such judges shall have the power to solemnize marriages."

That in virtue thereof and under the law of the State of Missouri as declared by the highest court of the said State, to-wit, the Supreme Court of the State of Missouri, the actions and judgments of the Probate Court are entitled to the same weight and effect as the judgments of other courts of record and are not open to collateral attack or question.

That after the death of the said David T. Bomar, deceased, to-wit, on the 1st day of October, 1917, his death was sug-

gested of record to the United States District Court for the Eastern Division of the Eastern District of Missouri in open session, by one of the parties to the record in the aforesaid cause, entitled Morgan Jones, complainant, *vs.* Union Electric Light and Power Company and others, defendants; and that thereafter on the 15th day of October, 1917, this petitioner appeared by counsel in open court and presented to the said court, the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and to the Honorable David P. Dyer, District Judge, who was then and there presiding in the said court, an intervening petition in words and figures as follows, to-wit:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

No. 4982.

MORGAN JONES ET AL., *Complainants,*

vs.

UNION ELECTRIC LIGHT AND POWER COMPANY ET AL., *Defendants.*

Intervening Petition of Frank M. Slater, Public Administrator of the City of St. Louis, Missouri.

To the Honorable the Judge of the District Court of the United States for the Eastern District of Missouri:

Frank M. Slater respectfully represents that he is the duly elected, qualified, and acting public administrator of the city of St. Louis, Missouri, and that he has been such since about the 1st day of January, 1917. That by the law of the State of Missouri it is the duty of this petitioner in his said official capacity to take charge of the estate of deceased persons when money, property, papers or other estate are left in a situation exposed to loss or damage, or where from any cause the probate court shall order him to take possession of any estate to prevent its being injured, wasted, purloined, or lost. That on the 22d day of September, 1917, one David T. Bomar, a citizen of the State of Texas, then and at all the times hereinafter mentioned domiciled in said State, departed this life in the State of Texas without leaving any heirs or persons next of kin, or any devisee or legatee, or other person, in the State of Missouri competent to administer upon his estate in Missouri. That for a long time heretofore the above-entitled cause has been pending in this court and that heretofore such proceedings have been taken

and had therein that the complainants recovered from the defendants, or some of them, a large sum of money, out of which there was set aside and awarded to the attorneys for the complainants, as counsel fees, the sum of ninety-five thousand seven hundred and seventy and no 100 ($95,770.00) dollars. That the said attorneys, among whom was the said David T. Bonar, were unable to agree among themselves upon a division of the said fund or sum of money, or upon the respective proportions of the same to which each was entitled, and that thereupon the said matter and the just and equitable division of the said fund among the said attorneys, was by the order of this court referred to a master in chancery for hearing and determination; that the said master, on the 13th day of July, 1917, duly reported to this court his finding thereon, to which in proper time exceptions were taken and filed; and that the said exceptions are and ever since have been pending in this court undetermined. That the said exceptions were directed against the amount awarded to the said David T. Bonar, out of the aforesaid fund, and if sustained, or otherwise favorably acted upon, would operate to cut down or diminish the amount which the said Bonar would receive out of the said fund, whereby the interest of the said Bonar in the said fund became and was in jeopardy and the same still remains so exposed. That the said fund was about the 17th day of July, 1915, by the order of this court deposited, pending the final disposition of the said exceptions in the State National Bank, a banking corporation, doing business in the city of St. Louis, Missouri, and that the same ever since has been and still is in the possession of the said bank and located in the said city and State, and that at and before the date of his death, as aforesaid, the said Bonar had earned and there was due to him an interest in the aforesaid sum of money, and that his interest in the said fund had never been by him in any manner disposed of or alienated. That upon receiving information of the death of the said Bonar as

aforesaid, and of the jeopardy in which the interest of the said Bomar in the said fund was placed by reason of the pendency of the said exceptions, this petitioner, in his said official capacity, did on or about the 25th day of September, 1917, take charge of the estate of the said David T. Bomar, deceased, in the State of Missouri in the manner and form required by the laws of the said State; and that thereafter, to wit, on the 5th day of October, 1917, the Probate Court of the city of St. Louis, Missouri, a court of record to which exclusively is committed by the laws of said State all matters pertaining to the granting of letters testamentary and of administration and the management, care and control of the estate of deceased persons who at the time of death had any right, title or interest in or to real or personal property within the said city of St. Louis, did make and render an order and judgment, and enter the same upon its records, wherein and whereby it found and determined to be true the facts aforesaid as to the death of the said Bomar and as to the non-existence in the State of Missouri of any persons or persons competent under the laws of the said State to administer upon his estate in Missouri; and further found and determined that the aforesaid fund or sum of money was and is actually on deposit in a national bank in the said city of St. Louis; that the interest of the said deceased was and is in danger of being diminished or impaired unless there be some person duly authorized and empowered to appear for and represent the estate of the said deceased; and that it was and is necessary and desirable that there be administration upon the said estate in Missouri; and did appoint this petitioner in his said official capacity administrator of the estate of the said David T. Bomar, deceased, in Missouri, and did direct and require him to proceed to take charge of and administer upon the goods, chattels and choses in action of him, the said deceased, in Missouri, a certified copy of which order and judgment is hereto attached marked "Exhibit A."

That by reason of the matters and things aforesaid and in virtue of the said order and judgment of the Probate Court of the city of St. Louis, Missouri, this petitioner is the sole and only representative of the said David T. Bonar, deceased, in Missouri, and the only person legally authorized to represent the estate of the said deceased in this or any other cause pending within the limits and boundaries of the State of Missouri.

Wherefore, this petitioner as administrator of the estate of David T. Bonar, deceased, in the State of Missouri, prays that the exceptions now pending as aforesaid to the report of the Master hereinbefore mentioned, finding and determining the proportion of the said fund to which the said Bonar was entitled, be overruled, and that the said report be in all things confirmed and approved; that judgment be entered upon the said report of the Master awarding to this petitioner as administrator in Missouri of the estate of David T. Bonar, deceased, the amount therein found to be due to the said Bonar, with such interest as may have accrued thereon, and ordering and directing the person or persons in custody of the said fund to pay the same over to this petitioner within a time to be fixed by this court, and that this petitioner may have such other and further orders, decrees and relief in the premises as may be necessary and requisite and agreeable to equity and justice.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Solicitors for said Petitioner.

and thereupon prayed leave to file the same and to appear thereafter in the aforesaid cause entitled Morgan Jones, complainant, *vs.* Union Electric Light and Power Company and others, defendants, as the personal representative in

Missouri of the estate of David T. Bomar, deceased, but that the said court declined and refused to recognize this petitioner as the administrator of the estate in Missouri of the said David T. Bomar, deceased, and declined to permit the said intervening petition to be filed and this petitioner to appear and participate in the aforesaid cause, or otherwise to act in the said court as the administrator of the estate in Missouri of the said David T. Bomar, deceased.

That this petitioner is wholly without remedy, by appeal or otherwise, against the aforesaid refusal of the said District Court to permit the said intervening petition to be filed, and cannot have redress therefor because he is not now a party to the record in the aforesaid cause of Morgan Jones, complainant, *vs.* Union Electric Light and Power Company and others, defendants, and his said intervening petition has never been filed or put of record in the said cause, but can only have a review of the action of the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri by means of the writ of mandamus, according to the prayer of this petition.

Wherefore, the premises considered, this petitioner prays Your Honors to take cognizance of the matters and things hereinbefore set forth, and thereupon to issue, under the seal of this court, your writ of mandamus directed to the Honorable David P. Dyer, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, or whomsoever may hereafter be presiding in the said court, commanding him to enter or cause to be entered on the record of said court in said cause, entitled "Morgan Jones *et al.*, complainants, *vs.* Union Electric Light & Power Company *et al.*," a proper order authorizing and permitting your petitioner, as administrator of the estate of said David T. Bomar within the State of Missouri, to appear in said cause and file therein such petition, intervening petition, or other proper pleading as may

be necessary for the protection of said estate and of his rights therein as the administrator thereof.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
District of Columbia, ss:

George B. Webster, of lawful age, makes oath before me and says that the matters and things set forth in the foregoing petition for a writ of mandamus are true.

——— ———.

FILED
NOV 21 1917
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 27 Original.

EX PARTE FRANK M. SLATER, PUBLIC ADMINISTRATOR OF THE CITY OF ST. LOUIS, MISSOURI, AS SUCH IN CHARGE OF THE ESTATE OF DAVID T. BOMAR, DECEASED, PETITIONER.

SUGGESTIONS IN SUPPORT OF PETITION FOR MANDAMUS.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

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SUGGESTIONS IN SUPPORT OF PETITION FOR MANDAMUS.

I.

Mandamus the proper remedy.

In re Conaway, 178 U. S., 421.

Ex parte Russell, 13 Wallace, 664, 670.

and the only adequate remedy.

Life and Fire Ins. Co. *vs.* Wilson, 8 Peters, 291.

II.

The petitioner, Slater, in virtue of his appointment by the probate court, is entitled to appear in the pending litiga-

tion in the district court as the representative of Bomar, the deceased.

In re Connaway, *supra*.
Terry *vs.* Shannon, 131 U. S., 40, 46.
Barribeau *vs.* Brant, 17 Howard, 43, 46.

III.

Under the circumstances set forth in this petition, it was the right and the duty of Slater, the petitioner, as public administrator, to take charge of Bomar's estate.

Becoapt *vs.* Lewis, 41 Mo. Ap., 546.
Wyeth Hdw. Co. *vs.* Lang, 54 Mo. Ap., 147.
Leeper *vs.* Taylor, 111 Mo., 312.

And having done so, his authority was not subject to collateral question.

Vermillion *vs.* Le Clare, 89 Mo. Ap., 55.
Green *vs.* Tittman, 124 Mo., 372.

IV.

By the law of the State of Missouri the judgment of the probate court at St. Louis, finding the existence of the facts essential to justify the intervention of the petitioner as public administrator and ordering him to take charge of and administer the Bomar estate, was immune from collateral question or attack in the district court.

Johnson *vs.* Beasley, 65 Mo., 250.
Desloge *vs.* Tucker, 196 Mo., 587, 601.
State *ex Rel. vs.* Reynolds, 121 Mo. Ap., 699, 707.

V.

The petitioner is without remedy by appeal or other ordinary means of reviewing the refusal to admit him into the

pending case, since he is not a party to the record, the district court having declined to allow his petition to be filed or his appearance to be entered.

Taylor *vs.* Savage, 1 Howard, 282.
Guion *vs.* Liverpool Ins. Co., 109 U. S., 168, 173.
Elwell *vs.* Fosdick, 134 U. S., 500, 513.
Ex parte Cutting, 94 U. S., 14.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Counsel for Petitioner.

(35594)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 27, Original.

EX PARTE: IN THE MATTER OF FRANK M. SLATER, PUBLIC ADMINISTRATOR, &c., PETITIONER.

RETURN OF RESPONDENT.

FILED DECEMBER 6, 1917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 27, Original.

EX PARTE: IN THE MATTER OF FRANK M. SLATER, PUBLIC ADMINISTRATOR, &c., PETITIONER.

RETURN OF RESPONDENT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1917.

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1 In the Supreme Court of the United States, October Term, 1917.

Number 27, Original.

In the Matter of the Application of FRANK M. SLATER, Public Administrator of the City of St. Louis, Missouri, as Such in Charge of the Estate of David T. Bomar, Deceased, for a Writ of Mandamus against the Honorable David P. Dyer, Judge of the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

Return of David P. Dyer, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

To the Honorable Edward D. White, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In compliance with the order to show cause why the prayer of the petitioner should not be granted, issued by this Honorable Court on November 19, 1917, and served November 28, 1917, the above named respondent does hereby respectfully present that:

On April 1, 1904, a bill in equity was filed in the Circuit Court of the United States, Eastern Division of the Eastern Judicial District of Missouri, by Morgan Jones, a citizen and resident of the State of Colorado, against the Missouri-Edison Electric Company and others, citizens and residents of the State of Missouri, assailing the consolidation of the Missouri-Edison Electric Company and the Union Electric Light and Power Company (of May 16, 1902), into Union Electric Light and Power Company (of September 9, 1903), as unlawful, fraudulent and detrimental to the interests of complainant and to the minority holders of the preferred stock of the Missouri-Edison Electric Company, and praying to have the consolida-

2 tion declared illegal and void, to require defendants to turn over to the Missouri-Edison Electric Company the property belonging to it for an accounting, to require the Missouri-Edison Electric Company and its officers to recognize the complainant as a stockholder in said company, or to have ascertained the value of complainant's stock in the Missouri-Edison Electric Company, and that the amount thereof be decreed to be a lien on all of the property and assets of said Missouri-Edison Electric Company and said consolidated Union Electric Company, and for the payment of the amount decreed to complainant and others similarly situated.

Subsequently, on July 6, 1916, a final decree for complainant, based upon the mandate of the United States Circuit Court of Ap-

peals for the Eighth Circuit, filed in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on June 26, 1916, was entered in said last mentioned court. A copy of said decree is hereto annexed, marked "Exhibit A."

Under the terms of said final decree, the Court found that the sum of $104,299.15, consisting of $8,529.15 theretofore received from their respective clients, and the sum of $95,770.00 then in the Registry of the Court, was and should be allowed by the Court as fair and reasonable compensation for the fees of solicitors in said cause, and further found "that counsel for complainant and intervenors have agreed that the amount retained by the Court for solicitors' fees and the said sum of $8,529.15 shall be apportioned between Wm. B. and Ford W. Thompson, Elencious Smith, Douglas W. Robert and David T. Bomar, according to the amount and value of the services by them herein rendered, respectively." And the Court by said decree expressly reserved and retained jurisdiction of the cause for the purpose of ascertaining and determining the division between counsel of the fees, as aforesaid, as well as for the purpose of making any other and further orders therein as might be proper or necessary.

Subsequently, on motion of David T. Bomar, Wm. B. and Ford W. Thompson, Douglas W. Robert and Elencious Smith, and in pursuance of their stipulation, the said sum which was in the registry of the Court was by respondent, as the Judge thereof, ordered transferred by the Clerk of said Court, from the Sub-treasury of the United States in St. Louis, to State National Bank, St. Louis,
3 Missouri, as more fully appears in an order entered of record on July 17, 1916, a copy of which is annexed hereto as "Exhibit C," and by said stipulation, a copy of which is annexed as "Exhibit C-1."

Subsequently, on September 21, 1916, a petition was filed in said cause by David T. Bomar, Douglas W. Robert and Elencious Smith, praying for apportionment and distribution of said fund then in the registry of the Court. A copy of said petition is annexed hereto as "Exhibit D."

Subsequently, on October 7, 1916, Wm. B. and Ford W. Thompson filed their answer to said petition, and also prayed for distribution of said fund. A copy of said answer and cross petition is annexed hereto as "Exhibit E."

Thereafter, on December 27, 1916, by consent of all of said parties interested in said fund, the Honorable F. L. Schofield, of Hannibal, Missouri, was appointed Special Master to take and hear all testimony that might be adduced on the part of the several parties in interest in said fund, and to report his findings, either of law or fact, to said District Court.

On June 27, 1917, an order was duly entered, requiring said State National Bank of St. Louis, with whom the Clerk had deposited said sum of $95,770.00, to furnish a bond with sureties, conditioned upon its paying over the sum so deposited with it in compliance with the order under which said fund had been de-

posited with it, and on June 30, 1917, such bond, in the sum of $100,000.00, was filed and approved. A copy of said bond is annexed hereto as "Exhibit F."

On July 13, 1917, the Special Master filed his report as to the division of attorneys' fees, and on July 31, exceptions to the Master's report were filed by Wm. B. and Ford W. Thompson. On August 1, 1917, exceptions to said Master's report were also filed jointly by said David T. Bomar, Elencious Smith and Douglas W. Robert. A copy of said last mentioned exceptions is annexed hereto as "Exhibit G."

On October 1, 1917, the death of David T. Bomar was suggested of record.

On Octol er 2, 1917, Wm. B. and Ford W. Thompson filed their application for a writ of scire facias to issue to Frank M. Slater to appear as the representative of David T. Bomar, deceased, and attached to said application a certified copy of a notice by said Frank M. Slater, Public Administrator for the City of St. Louis,
4 Missouri, giving notice to the Honorable Charles W. Holtcamp, Judge of the Probate Court of the City of St. Louis, Missouri, that he had, on the 27th day of September, 1917, taken charge of the estate of David T. Bomar. A copy of said application for writ of scire facias and of said certified copy of notice attached thereto is annexed hereto as "Exhibit H."

Subsequently, on October 13, 1917, Anna E. Bomar filed in said cause a motion to revive the said cause by substituting her as a party thereto in the place of David T. Bomar, deceased, and to permit her to enter her appearance therein as such substituted party. A copy of said motion is annexed hereto as "Exhibit I," and a copy of a duly certified copy of the will of David T. Bomar, together with the order of Court appointing her as temporary administratrix filed with said motion, is annexed hereto as "Exhibit I-1." And on the same day proof of service of a copy of said last mentioned motion upon Frank M. Slater, Public Administrator, and upon Messrs. Thompson and Thompson, was also filed herein.

Thereafter, on October 16, 1917, the said application of Messrs. Thompson and Thompson for a writ of scire facias, and the motion of Anna E. Bomar for substitution, came on for hearing, and there was present the petitioner herein, Frank M. Slater, Public Administrator of the City of St. Louis, Missouri, by George B. Webster, one of his solicitors, who orally moved for leave to file his intervening petition, a copy of which is annexed hereto as "Exhibit J." Said Anna E. Bomar was also present by her solicitors, as were Messrs. Thompson and Thompson, Elencious Smith and Douglas W. Robert. The Court thereupon heard the counsel of all of the said parties to the cause, and of said Anna E. Bomar, and of said Frank M. Slater, Public Administrator of the City of St. Louis, Missouri, fully on all the questions raised by said application of Messrs. Thompson and Thompson for writ of scire facias, said oral application of the Public Administrator for leave to file his intervening petition, and said motion of Anna E. Bomar for substitution, and on said last mentioned date took said matters as sub-

mitted, but permitted the said parties and said Frank M. Slater, Public Administrator, and said Anna E. Bomar to file briefs in support of their respective contentions. A brief on behalf of said Frank M. Slater, Public Administrator, was thereafter submitted to the Court and a copy of the same is annexed hereto as "Exhibit K." A brief on behalf of Anna E. Bomar, Elenious Smith and Douglas W. Robert was also thereafter submitted to the Court, and a copy of the same is attached hereto as "Exhibit L." Subsequently, a brief on behalf of Frank M. Slater, Public Administrator, in reply to the argument for Anna E. Bomar and others was submitted to the Court and a copy of the same is annexed hereto as "Exhibit M."

Subsequently, the Court having heard the counsel for said parties claimant, and for said Frank M. Slater, Public Administrator, and for said Anna E. Bomar, fully on all questions raised by said application of Messrs. Thompson and Thompson for scire facias, by said oral application of Frank M. Slater, Public Administrator for leave to intervene, and by said motion of Anna E. Bomar for substitution, and having considered all said briefs filed in support of their respective positions, decided the same on October 29, 1917, in the exercise of its jurisdiction and official discretion and made an order denying the said application of Messrs. Thompson and of said Frank M. Slater, Public Administrator, and sustaining the motion of Anna E. Bomar, and reviving the cause as to David T. Bomar by substituting Anna E. Bomar as a party claimant. A copy of said order is annexed hereto as "Exhibit N." The reasons for the action of the Court are set forth in a memorandum opinion filed on October 29, 1917, in said cause, a copy of which is annexed as "Exhibit O."

Thereafter, on November 16, 1917, said Anna E. Bomar filed her motion in said cause, setting forth that the will of her husband, David T. Bomar, had been duly probated in the County Court of Tarrant County, Texas, on the 6th day of November, 1917, and that said County Court had adjudged and decreed that there were no debts owing by the estate of David T. Bomar, deceased, and that no administration was necessary upon said estate, and that by virtue of said decree, the laws and statutes of the State of Texas, and the terms of said will of David T. Bomar, deceased, all the right, title and interest of David T. Bomar in and to the fund in said District Court of the United States, as well as all his rights or claims thereto, were vested absolutely in said Anna E. Bomar in her individual capacity as of the date of the death of said David T. Bomar, deceased,

6 and praying said District Court to recognize her as the absolute owner, in her individual capacity, of all right, title and interest of David T. Bomar in and to said fund in said Court, and that she be substituted in her individual capacity as a party claimant in place of said David T. Bomar, deceased, and to permit her to adopt, as her own, the exceptions theretofore filed in behalf of said David T. Bomar to the report of the Special Master in said cause, and to permit her, as the owner of the interest in said fund which said David T. Bomar had at the time of his death,

to appear in said cause. A copy of said motion and of the exhibit attached thereto is annexed hereto as "Exhibit P."

Thereafter, on November 19, 1917, said last mentioned motion came on for hearing in said District Court, at which hearing all of the record parties claimant were represented by their respective solicitors, and said Court having considered the proofs then adduced in open court in support of said motion, and having heard counsel for said parties fully on the questions raised thereby, decided said motion on November 19, 1917, in the exercise of its jurisdiction and official discretion, and made an order granting said motion recognizing said Anna E. Bomar in her individual right as the owner of all right, title and interest of said David T. Bomar in and to the said fund then in the registry of the Court. A copy of said order is annexed hereto as "Exhibit Q."

And on said 19th day of November, 1917, said Anna E. Bomar, by her solicitors, in open court, adopted all the pleadings, including the pending exceptions to the Master's report theretofore filed by or on behalf of David T. Bomar in said cause, in said United States District Court, and thereupon all the parties claimant to said fund being represented by their respective solicitors, the Court ordered that the hearing of all exceptions to the report of the Special Master in said cause be set down for Friday, November 30, 1917, by an order, a copy of which is annexed hereto as "Exhibit R."

Thereafter, on November 28, 1917, the respondent was served with a copy of the rule to show cause herein.

Thereafter, on November 30, 1917, the hearing on said exceptions was by the Court postponed pending determination by this
7 Honorable Court of the rule to show cause herein.

All orders and decrees made by said United States District Court were made upon due notice or on the appearance of the parties and in the exercise of the jurisdiction and official discretion of the respondent as the Judge of said District Court, and were entered because, in the opinion of the Court, the papers on which they were based, together with the earlier proceedings in said cause and the evidence adduced, indicated that such orders and decrees should be entered.

This return includes all papers in the case relating to any motion, petition or application of Frank M. Slater, Public Administrator of the City of St. Louis, Missouri, and, up to this point, is confined to the record in accordance with the respondent's construction of the purpose and intention of the order to show cause.

Respondent further states that on the 7th day of November, 1917, being the same date on which the application for leave to file the petition for writ of mandamus was made herein, an authenticated copy of the will of David T. Bomar and of the application for probate and judgment of probate thereon in the County Court of Tarrant County, Texas, was filed for probate in the Probate Court of the City of St. Louis, Missouri, and said authenticated copy was duly admitted to probate in said Probate Court of the City of St. Louis, Missouri, and that thereby, and by an order of the judge of said Probate Court of the City of St. Louis, all authority of

Frank M. Slater, Public Administrator, as such in charge of the estate in Missouri of David T. Bomar, deceased, was revoked; and that he is not, and since said 7th day of November, 1917, said Frank M. Slater, Public Administrator, has not been in charge of said estate in Missouri of David T. Bomar, deceased, in the capacity in which he applied for and obtained leave to file his petition for a writ of mandamus herein. A certified and authenticated copy of the record of the Probate Court of the City of St. Louis, Missouri, showing said revocation of his authority by the Court, is annexed hereto as "Exhibit S." And this respondent further states that under the laws of the State of Missouri, as interpreted by the highest courts of said State, the probating of a will revokes
8 all authority of a public administrator in charge of any estate in the State of Missouri.

This respondent further states, however, that thereafter, on said 7th day of November, 1917, said Frank M. Slater, Public Administrator, again filed notice in the office of the Clerk of said Probate Court that he had taken charge of the estate of said David T. Bomar, deceased, in the State of Missouri, with the last will of said deceased annexed, and on said 7th day of November, 1917, the Judge of said Probate Court again directed said Public Administrator to take into his charge and custody, as such Public Administrator, the estate of said deceased remaining unadministered, and to administer the same according to law and the last will of said deceased, all of which fully appears in said Exhibit S.

Messrs. Daniel G. Taylor and Jacob Chasnoff, solicitors for Eleneious Smith, Douglas W. Robert, and during his lifetime for David T. Bomar, and for Anna E. Bomar in her capacity as temporary administratrix, and individually, having expressed to the respondent a desire to be heard in this cause, in order to secure them such opportunity, the respondent hereby designates them, or such associate counsel as they may select, to present this return, and to file such brief and make such argument as may be required on the order to show cause.

DAVID P. DYER, *Judge*.

December 3d, 1917.

9 [Endorsed:] In the Supreme Court of the United States, October Term, 1917. Number 27 Original. In the Matter of the application of Frank M. Slater, Public Administrator of the City of St. Louis, Missouri, as such in charge of the Estate of David T. Bomar, deceased, for a Writ of Mandamus against the Honorable David P. Dyer, Judge of the District Court of the United States, for the Eastern Division of the Eastern District of Missouri. Return of David P. Dyer, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri. Taylor & Chasnoff, St. Louis.

10 EXHIBIT "A" TO RETURN.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4982. In Equity.

MORGAN JONES, Complainant,

vs.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants; FRANK A. RUF et al., Intervenors.

July 5th, 1916.

The mandate and opinion of the United States Circuit Court of Appeals for the Eighth Circuit having been filed herein, and all parties appearing by their respective solicitors the Court doth now, in accordance with said mandate and opinion, find, order and decree:

(1) That the complainant and intervenors, or their legal representatives, holding respectively the number of shares of preferred or common stock of the Missouri Edison Electric Company, hereinafter set forth, have and recover from defendant, the Union Electric Light and Power Company, of September 9th, 1903, the sum of $107.50 for each share of preferred stock and one-half said sum for each
11 share of common stock of said Missouri-Edison Electric Company, with interest thereon from September 9th, 1903, to this date, at the rate of six per cent. per annum, the amount so to be recovered by each, including interest to this date, being as follows:

Morgan Jones	1002	shares	preferred	$190,580.40
Frank A. Ruf	1160	"	"	220,632.00
Benjamin C. Jinkins	200	"	"	38,040.00
Oscar J. Gerhard	10	"	"	1,902.00
Ferdinand E. Miltenberger	25	"	"	4,755.00
Louis T. Maguire	100	"	"	19,020.00
August Goessling	20	"	"	3,804.00
Meredith Martin	35	"	"	6,657.00
Jos. B. Givens	125	"	"	23,775.00
Gustav A. Elbring	70	"	"	13,314.00
John H. Blessing	120	"	"	22,824.00
Charles Rechtern	50	"	"	9,510.00
Donaldson Bond & Stock Co.	22	"	"	4,184.40
John H. Dieckman	130	"	"	24,726.00
J. Brooks Johnson	50	"	"	9,510.00
L. P. Eber, Sr.	10	"	"	1,902.00
Christine Zeller	50	"	"	9,510.00
Alexander B. Garvin	10	"	"	1,902.00
Ferdinand E. Miltenberger	30	"	common	2,853.00
Making the total amount of				$609,400.80

(2) The Court doth find that said defendant Union Electric Light and Power Company has heretofore paid into the registry of this Court for the use and benefit of complainant and intervenors, respectively, or their legal representatives, the sum of $379,286.49, and that said sum is now in the registry of this Court; that the said defendant Union Electric Light and Power Company has also paid to the complainant, Morgan Jones, $160,520.40, and to the intervenor, Benjamin C. Jinkins, the sum of $32,040.00, in full payment and settlement of the said sums due them aforesaid for their shares
12 of the preferred stock of the Missouri-Edison Company, less the sum of $30.00 per share, to cover solicitors' fees; and that said defendant Union Electric Light and Power Company has also paid to the intervenor, John H. Dieckman, the sum of $20,826.00, in full satisfaction of the sum of $24,726.00 due him aforesaid for his shares of the preferred stock in said Missouri-Edison Electric Company as shown above, less the sum of $3,900.00 to cover solicitors' fees; that the said defendant Union Electric Light and Power Company has also paid to the intervenor Joseph B. Givens the sum of $16,727.91, in partial satisfaction of said sum of $23,775.00 due him, aforesaid, for his 125 shares of preferred stock aforesaid, leaving a balance of $3,297.09, after deducting said sum and the sum of $3,750.00 to cover solicitors' fees. That all of the amounts aforesaid, including the amount heretofore paid into the registery of this Court, aggregate the sum of $609,400.80 now found by the Court to be the full sum due by the defendant Union Electric Light and Power Company to the complainant and all of the intervenors, and that thereby said defendant has fully discharged and satisfied all of its liabilities, and that of its codefendants, to said complainant and all said intervenors.

And the Court doth further find that complainant and all of the intervenors have agreed upon a charge against said gross sum of $609,400.80 of the sum of $30.00 for each share of the preferred stock of the Missouri-Edison Company, and $15.00 per share for each share of the common stock of said Company, in ad-
13 dition to the sum of $4,209.15, paid by the complainant and some of the intervenors to complainant's solicitors, and the sum of $4,320.00 paid by the intervenor, F. A. Ruf, to his solicitor, making the total sum $8,529.15, making an aggregate of $104,649.15 as fair and reasonable compensation for the fees of solicitors in this cause, and that all parties have consented to such allowance only on condition that the same, together with all further sums, heretofore paid by them, shall be accepted in full payment and satisfaction of all liabilities due from them, or either of them, with respect to solicitors' fees, costs, expenses or otherwise, subject to the specific deductions hereinafter mentioned, and upon the further condition that there be refunded to the intervenor, J. Brooks Johnson, out of said allowance for counsel fees, the sum of $350.00 heretofore paid by him, to his solicitor, Hugo Muench.

(3) And it further appearing that said defendant, Union Electric Light and Power Company has paid all of the amounts aforesaid, the Court doth now adjudge and decree that the complainant and intervenors recover nothing further from defendants, or any of

them, and that said complainant and intervenors are entitled to no other or further relief as against defendants, and they are now ordered and directed to file their several certificates representing their stock aforesaid, with the Clerk of this Court for the use of said defendant, Union Electric Light and Power Company, and that defendants go hence without day. The Clerk of this Court is
14 hereby ordered and directed to deliver to said defendant, Union Electric Light and Power Company, or to Schnurmacher & Rassieur, its solicitors, from time to time, such certificates of stock, preferred and common, of the Missouri-Edison Electric Company, as may be deposited by complainant and intervenors under the terms of this decree.

(4) The Court doth now determine and decree that the Clerk of this Court pay to the intervenor, Frank A. Ruf, or his solicitors, William B. and Ford W. Thompson, all of said sum of $220,632.00, due him for his shares of preferred stock aforesaid, less the sum of $30.00 per share, or the sum of $34,800.00, to cover solicitors' fees, as agreed upon between the parties.

The Clerk of this Court is hereby directed to pay to the intervenor, Oscar J. Gerhard, the sum of $1,602.00 in full payment and settlement of the $1,902.00 due him for his 10 shares of preferred stock aforesaid, less the sum of $300.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to the intervenor, Ferdinand E. Miltenberger, the sum of $6,332.80, being the amount of the $4,755.00 due him for his 25 shares of preferred stock, and $2,853.00 due him for his 30 shares of common stock of said Missouri-Edison Company, less the sum of $30.00 per share, or $750.00, as solicitors' fees with respect to said preferred shares, and $15.00 per share with respect to his common stock, or the sum of $450.00; together with the additional sum of $75.20 to cover
15 his proportion of the cost and expenses incurred herein.

The Clerk of this Court is hereby directed to pay to the intervenor, Louis T. Maguire, the sum of $16,020.00 in discharge and payment of the $19,020.00 due him for his 100 shares of preferred stock of the Missouri-Edison Company aforesaid, less $3,000.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to the intervenor, August Goessling, the sum of $3,204.00, being the amount of $3,804.00 due him for 20 shares of the preferred stock of said Missouri-Edison Company, less the sum of $600.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to the intervenor, Meredith Martin, the sum of $5,607.00, in full discharge of the $6,657.00 due him for his 35 shares of preferred stock of Missouri-Edison Company, less the sum of $1,050.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to the intervenor, Gustav A. Elbring, the sum of $11,214.00, in full discharge of the $13,314.00 due him for his 70 shares of preferred stock of said Company, less the sum of $2,100.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to the intervenor, John H. Blessing, the sum of $18,634.62, in full discharge of the $22,824.00 due him for his 120 shares of the preferred stock

of the said Missouri-Edison Company, less the sum of $3,600.00 to cover solicitors' fees, and $589.38 to cover his proportion of
16 the unpaid costs and expenses paid by the complainant in this suit.

The Clerk of this Court is hereby directed to pay to Ellen Rechtern, executrix of the will of Charles Rechtern, deceased, the sum of Eight Thousand and Ten Dollars ($8,010.00) in full discharge of the $9,510 due her for fifty (50) shares of the preferred stock of said Missouri-Edison Company, less the sum of $1,500.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to the intervenor Donaldson Bond and Stock Company the sum of $3,524.40, in full discharge of the $4,184.40 due it for its twenty-two shares of the preferred stock of the said Missouri-Edison Company, less $660.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to the intervenor, J. Brooks Johnson the sum of $8,360.00 in full discharge of said sum of $9,510.00 due him for fifty shares of preferred stock of said Company, less the sum of $1,150.00 to cover solicitors' fees, the same being the amount due from him of $30.00 per share after deducting therefrom $350.00 solicitors' fees paid by him to his solicitor, Hugo Muench.

The Clerk of this Court is hereby directed to pay to Marie Rapp and St. Louis Union Trust Company, as Executors of Louis P. Eber, Sr., deceased, the sum of $1,602.00 in full discharge of the $1,902.00 due him, for his ten shares of the preferred stock of the said Missouri-Edison Company, less the sum of $300.00 to cover solicitors' fees.

17 The Clerk of this Court is hereby directed to pay to the intervenor, Christine Zeller, executrix of Albert H. Zeller, deceased, the sum of $8,010.00, in full discharge of the $9,510.00 due her for fifty shares of the preferred stock of said Company, less the sum of $1,500.00 to cover solicitors' fees.

The Clerk of this Court is hereby directed to pay to Alexander B. Garvin, the sum of $1,551.86, in full discharge of the $1,902.00 due him for his ten shares of the preferred stock of the said Missouri-Edison Company, less the sum of $300.00 to cover solicitors' fees, and $50.14 to cover costs and expenses.

The Clerk of this Court is hereby directed to pay to the intervenor, Joseph B. Givens, the sum of $3,297.09, to cover the balance due him on his 125 shares of preferred stock in said Missouri-Edison Company.

(5) It is further ordered that in consideration of the sums deducted from the shares of the intervenors, Frank A. Ruf and J. B. Johnson, and by consent of all other parties to this cause, that said Ruf and Johnson are relieved and discharged from any further obligation or any further contribution to either costs, expenses or solicitors' fees in this cause.

(6) It is further ordered, adjudged and decreed that complainant and intervenors, aforesaid, and each of them, and their said legal representatives, shall within ninety days, deposit with the clerk of this Court their respective certificates of stock, hereinbefore

referred to in paragraph (1) of this decree, properly endorsed, and said certificates of stock shall thereupon be delivered to the
18 defendant, Union Electric Light and Power Company, or to Schnurmacher & Rassieur, its solicitors; and no payment shall be made by the clerk to complainant or to any intervenor, or the representatives of any intervenor, out of the fund so deposited by defendant, Union Electric Light and Power Company, until such complainant, intervenor or legal representative shall have deposited with the clerk for the use and benefit of said Union Electric Light and Power Company his, her or their certificates of stock for the number of shares hereinbefore referred to.

(7) In the event complainant or any intervenor, or the legal representatives of any intervenor, shall fail to deliver and deposit their said certificates of stock with the clerk of this Court within the time hereinbefore provided, then and in such case, it shall be optional with said defendant, Union Electric Light and Power Company to apply to this Court for such orders as may be necessary to compel the delivery and deposit of such certificates of stock or to apply to the clerk of this Court for the repayment of so much of the money deposited in the registry of the Court by said defendant as shall represent the shares of stock not delivered him; and the clerk is hereby ordered and directed, on such request of said Union Electric Light and Power Company to return and repay to it the amount representing the shares of stock not delivered him; and thereupon such complainant or intervenor shall recover no relief against the defendants, or any of them, in this cause.

(8) The Court also finds that defendants have paid all
19 costs that have been taxed against them herein.

(9) The Court further finds that counsel for complainant and intervenors have agreed that the amount retained in Court for solicitors' fees, and said sum of $8,529.15, shall be apportioned between Wm. B. and Ford W. Thompson, Elenecious Smith, Douglas W. Robert and David T. Bomar, according to the amount and value of the services by them herein rendered, respectively.

(10) The Court reserves and retains this cause for the purpose of ascertaining and determining the division between counsel herein of the fees as aforesaid, as well as the making of any other and further orders herein as may be proper or necessary.

JACOB TRIEBER,
United States District Judge.

The foregoing draft of decree is hereby approved:

D. W. ROBERT,
ELENEIOUS SMITH,
D. T. BOMAR,
Solicitors for Complt.
W. B. & FORD W. THOMPSON,
Solicitors.
HUGO MUENCH,
Solicitor for J. Brooks Johnson.
SCHNURMACHER & RASSIEUR,
St. Louis, July 5, 1916. *Solicitors for Defts.*

20 [Endorsed:] No. 4982. In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones, Complainant, vs. Missouri-Edison Electric Company et al., Defendants; Frank A. Ruf et al., Intervenors. Final Decree. Schnurmacher & Rassieur, Attorneys at law, St. Louis. Filed Jul- 6, 1916. W. W. Nall, Clerk.

21 EXHIBIT "C" TO RETURN.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4982. In Equity.

MORGAN JONES, Complainant,

vs.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants; FRANK A. RUF et al., Intervenors.

July —, 1916.

In pursuance of the stipulation this day filed by David T. Bomar, W. B. & Ford W. Thompson, Douglas W. Robert and Eleneious Smith, and upon motion of the said parties,

It is ordered that the Clerk of this Court be, and he is hereby directed to transfer from the sub-treasury of the United States in St. Louis to State National Bank, St. Louis, Mo., the fund in the above entitled cause now on deposit in said sub-treasury, amounting to the sum of $95,770.00 on condition that said bank agree to pay interest on said fund at the rate of three per cent per annum and consent that said fund may be withdrawn upon said clerk under the order of this Court giving thirty-one days' notice to said bank of the intention to make such withdrawal.

DAVID P. DYER,
District Judge.

O. K.:

D. T. BOMAR.
ELENEIOUS SMITH.
DOUGLAS W. ROBERT.
W. B. & FORD W. THOMPSON.

[Endorsed:] Filed Jul- 17, 1916. W. W. Nall, Clerk.

22 EXHIBIT "C-1" TO RETURN.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4982. In Equity.

MORGAN JONES, Complainant,

vs.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants; FRANK A. RUF et al., Intervenors.

Stipulation.

It is stipulated and agreed that the fund in the above entitled cause, now on deposit in the sub-treasury of the United States in the City of St. Louis, Missouri, be transferred by the clerk of this court to State National Bank, St. Louis, Mo., on the condition that said bank agree to pay interest upon said fund at the rate of three per cent. per annum, and permit the same to be withdrawn by said clerk under the order of this court, upon giving said bank thirty-one days' notice of intention to make such withdrawal.

D. T. BOMAR.
ELENEIOUS SMITH.
DOUGLAS W. ROBERT.
W. B. & FORD W. THOMPSON.

July 7th, 1916.

[Endorsed:] Received, filed and entered Jul- 17, 1916. W. W. Nall, Clerk.

23 EXHIBIT "D" TO RETURN.

In the United States District Court, Eastern Division of the Eastern District of Missouri, September Term, 1916.

No. 4283.

MORGAN JONES et al., Complainants,

vs.

MISSOURI EDISON ELECTRIC COMPANY et al., Defendants.

Now come David T. Bomar, Eleneious Smith and Douglas W. Robert, Solicitors for the complainant and intervenors in the above entitled cause, and show to the Court that there is in the registry of the Court the sum of $95,770.00 which remains therein as a fee for your petitioners and the firm of W. B. and Ford W. Thompson, solicitors for Frank A. Ruf, pursuant to the decree herein rendered.

That your petitioners have each received as a part payment of a fee in said cause the sum of $1,403.05, and the firm of W. B. and Ford W. Thompson has received $4,320.00, making a total of $104,299.15, which has heretofore by said decree been allowed your petitioners and said firm as a fair and reasonable compensation for the fees of solicitors in said cause. That said decree further provides that the sum of $95,770, together with the sum of $8,529.15 shall be apportioned between these petitioners and said firm, according to the amount and value of the services of them herein respectively.

That your petitioners had each rendered service of the amount and value of one-fourth of said fee and the firm of W. B. and Ford W. Thompson has also rendered service to the amount and value of one-fourth of said fee.

24 Wherefore, your petitioners pray the Court to make an order directing the Clerk to pay to your petitioners each the sum of one-fourth of said sum of $104,299.15, less the sums heretofore paid, or the net sum of $24,671.74 each out of the fund in the registry of the Court, and to the firm of W. B. and Ford W. Thompson one-fourth of said sum of $104,299.15, less the sum heretofore paid, or the net sum of $21,754.78 out of the fund in the registry of the court.

DAVID T. BOMAR.
ELENEIOUS SMITH.
DOUGLAS W. ROBERT.

25 [Endorsed:] No. 4982. United States District Court, E. D. of E. D. of Mo. Morgan Jones, Complainant, vs. Missouri Edison Electric Co. et al., Defendants. Motion for Distribution of Attorneys' Fees. Filed Sep. 21, 1916. W. W. Nall, Clerk.

Service of copy of this motion acknowledged this 20th day of September, A. D. 1916.

W. B. & FORD W. THOMPSON.

26 EXHIBIT "E" TO RETURN.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4982.

MORGAN JONES, Plaintiff,

vs.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

Answer of W. B. & Ford W. Thompson to the Motion Herein Filed by David T. Bomar, Elenious Smith, and Douglas W. Robert.

Now come W. B. & Ford W. Thompson and in answer to the aforesaid motion state:

They admit that said David T. Bomar, Elenious Smith and Douglas W. Robert have received in part payment of a fee in this cause a sum aggregating $4,209.15, and the firm of W. B. & Ford W. Thompson has received, in part payment of a fee in this cause, the sum of $4,320.00, and that there is now in the registry of this Court the sum of $95,770.00, which remains in the registry of this Court, under the decree heretofore entered, as a fee in which the said W. B. & Ford W. Thompson have an interest.

Said W. B. & Ford W. Thompson deny that said David T. Bomar, Elenious Smith and Douglas W. Robert have each rendered services of the amount and value of one fourth of $104,299.15; and also deny that the said David T. Bomar, Elenious Smith and Douglas W. Robert jointly have rendered services in this litigation of the amount and value of three fourths of the said sum of $104,299.15; and deny
that said firm of W. B. & Ford W. Thompson have rendered
27 services in this litigation only to the amount and value of one fourth of $104,299.15.

On the contrary, said W. B. & Ford W. Thompson claim that they have rendered services in this litigation to the amount and value of one half of $104,299.15, to-wit, in the sum of $52,149.57, and that, after deducting the sum of $4,320.00 heretofore received by the said W. B. & Ford W. Thompson on account, they are entitled to the sum of $47,829.57, together with interest that may have accrued thereon while in the registry of this Court.

Wherefore, said W. B. & Ford W. Thompson pray this Court to make an order directing the clerk of this Court to pay to the said W. B. & Ford W. Thompson, out of said fund of $95,770.00 now in the registry of this Court, the sum of $47,829.57, together with interest that may have accrued thereon, at the date of the payment by the said clerk, while in the registry of this Court.

PAUL BAKEWELL,
Solicitor for W. B. & Ford W. Thompson.

St. Louis, October 7th, 1916.

28 [Endorsed:] No. 4982. In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones, Plaintiff, vs. Missouri-Edison Electric Co. et al., Defendants. Answer of W. B. & Ford W. Thompson to the Motion herein filed by David T. Bomar, Elenious Smith and Douglas W. Robert. Paul Bakewell, Solicitor for W. B. & Ford W. Thompson. Filed Oct. 7, 1916. W. W. Nall, Clerk.

29 EXHIBIT "F" TO RETURN.

Know all men by these presents: That we State National Bank of St. Louis as principal and Edward B. Pryor, Daniel K. Catlin, and A. O. Wilson as surety, *and* held and firmly bound *into* the United States of America in the sum of one hundred thousand dollars, for the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated at St. Louis this thirtieth (30th) day of June, A. D. 1917.

The condition of the above obligation is such that

Whereas, the United States District Court of the Eastern Division of the Eastern District of Missouri on the day of July 17th, 1916, in the case of Morgan Jones Complainant vs. Missouri Edison Electric Light & Power Company et al. No. 4982, made an order directing the Clerk of said court to deposit the sum of Ninety-five thousand Seven Hundred Seventy Dollars in the State National Bank of St. Louis to be by it held, and by it paid over as subsequently directed by said court and under the agreement between Messrs. W. B. & Ford W. Thompson, David T. Bomar, Elenecious Smith and Douglas W. Robert.

Now therefore, if the said State National Bank of St. Louis shall pay over said money pursuant to and in compliance with said order and agreement then this obligation is to be void, otherwise to remain in full force and effect.

STATE NATIONAL BANK OF ST. LOUIS.
By EDWARD B. PRYOR, *President.* [SEAL.]
EDWARD B. PRYOR. [SEAL.]
DANIEL K. CATLIN. [SEAL.]
A. O. WILSON. [SEAL.]

Approved June 30, 1917.
DAVID P. DYER, *Judge.*

30 EXHIBIT "G" TO RETURN.

In the District Court of the United States, Eastern Division of the Eastern Judicial District of Missouri.

No. 4982.

In the Matter of Division of Attorneys' Fees Out of the Fund Paid Into Court Under Decree Entered in This Cause July 5, 1916.

MORGAN JONES, Complainant,

v.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

Exceptions on Behalf of Messrs. Elenecious Smith, David T. Bomar, and Douglas W. Robert to the Report of the Special Master.

Messrs. Smith, Bomar and Robert except and object to the report of the Special Master heretofore filed in this cause in the following particulars:

I.

To that portion of the report wherein the Master finds that the Messrs. Thompson performed service equal to and are entitled to

credit for eighteen per cent of the amount and value of all work done in the first period. Exceptors respectfully represent that the Messrs. Thompson did not perform service equal to, nor are they entitled to credit for more than ten per cent of the amount and value of all the work done in the first period.

II.

To that portion of the report wherein the Special Master finds that 38 per cent of the amount and value of the entire work and service performed by counsel in the case was performed in the second period. Exceptors respectfully represent that the work and service performed by counsel in this period should be assigned, as its relative value, a smaller percentage than that assigned by the Special Master.

III.

To that portion of the report wherein the Special Master
31 finds that the Messrs. Thompson performed service equal to and are entitled to credit for 37 per cent of the amount and value of all the work done in the second period. Exceptors respectfully represent that the Messrs. Thompson did not perform, nor are they entitled to credit for more than 20 per cent of all the work done in the second period.

IV.

To that portion of the report wherein the Special Master finds that 34 per cent of the amount and value of the work and service performed by counsel in the case was performed in the third period. Exceptors respectfully represent that the service performed by counsel in the third period should be assigned, as its relative value, a greater percentage than that assigned to said service in said period by the Special Master.

V.

To that portion of the report wherein the Special Master finds that the Messrs. Thompson performed service equal to and are entitled to credit for 31 per cent of the amount and value of all the work done in the third period. Exceptors respectfully represent that the Messrs. Thompson did not perform service equal to nor are they entitled to credit for more than 25 per cent of the amount and value of all the work done in the third period.

Respectfully submitted,

DANIEL G. TAYLOR,
Solicitor for Messrs. Elencious Smith, David T. Bomar, and Douglas W. Robert.

The receipt of a copy of the foregoing at St. Louis, Missouri, this 1st day of August, 1917, is hereby acknowledged.

PAUL BAKEWELL,
Solicitor for Messrs. W. B. & Ford W. Thompson.

32 [Endorsed:] No. 4982. In the District Court of the United States, Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones, Complainant, v. Missouri-Edison Electric Company et al., Defendants. Exceptions on Behalf of Messrs. Eleneious Smith, David T. Bomar, and Douglas W. Robert, to the Report of the Special Master. Taylor & Chasnoff, St. Louis. Filed Aug. 1, 1917. W. W. Nall, Clerk.

33 EXHIBIT "H" TO RETURN.

In the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri.

No. 4982.

MORGAN JONES, Plaintiff,

v.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

In the Matter of the Division of Attorneys' Fees Out of Funds in Court Under Decree Dated July 5, 1916, Filed July 6, 1916, on Exceptions to Master's Report.

Now come W. B. and Ford W. Thompson, by their solicitor and counsel, and state to the court that on Monday, October 1, 1917, in open court, the death of David T. Bomar, one of the parties in interest in regard to the matter of division of attorneys' fees out of the fund paid into court, was suggested to the court; and that Letters of Administration upon the estate of said David T. Bomar within the State of Missouri have been issued to Frank M. Slater, Public Administrator of the City of St. Louis, Missouri, and as such he is in charge of the estate of said David T. Bomar, Deceased, in Missouri.

A certified copy of said Letters of Administration are hereto attached and made part hereof.

Wherefore, said W. B. and Ford W. Thompson pray the court that the Administrator of the estate of said David T. Bomar, Deceased, be made a party to these proceedings and that a scire facias issue forthwith to said Administrator, Frank M. Slater, that he appear in this cause as the representative of said David T. Bomar, Deceased—all in accordance with the Statute of the United States in such case made and provided.

PAUL BAKEWELL,

Solicitor for W. B. and Ford W. Thompson.

St. Louis, Oct. 2, 1917.

34 STATE OF MISSOURI,
City of St. Louis, ss:

To the Honorable Chas. W. Holtcamp, Judge of the Probate Court of the City of St. Louis:

Notice is hereby given to creditors and all other persons interested in the Estate of David T. Bomar who died Sept. 22/17, late of the City of Ft. Worth, Texas, deceased, that I, the undersigned, Public Administrator within and for the City aforesaid, have this day taken charge of said estate for the purpose of administering the same.

Given under my hand, this 27 day of Sept., A. D. 1917.

FRANK M. SLATER,
Public Administrator.

STATE OF MISSOURI,
City of St. Louis, ss:

I, George Brand, Clerk of the Probate Court, of the City of St. Louis, do hereby certify that the foregoing is a true copy of a notice filed in my office, on the 27 day of Sept., 1917, by Frank M. Slater, Public Administrator, of his having taken charge of the Estate of David T. Bomar, deceased, whereby he is duly authorized and empowered to secure and dispose of the property of said deceased, according to law, collect all moneys due said deceased, and, in general, to do and perform all other acts and things which are, or hereafter may be, required of him by law.

And I further certify that said Frank M. Slater, whose name is subscribed to said notice, is the Public Administrator of the City of St. Louis, duly elected, qualified and acting in that capacity.

In witness whereof, I hereunto set my hand and affix the seal of said Court, at office, this 27 day of Sept., 1917.

[Seal Probate Court of the City of St. Louis, Missouri.]

GEORGE BRAND, *Clerk*,
By C. W. HUNT, *Deputy*.

34½ [Endorsed:] No. 48472. Estate of David T. Bomar. Certified Copy of Administration by Public Administrator.

35 [Endorsed:] In the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri. Morgan Jones, Plaintiff, v. Missouri-Edison Electric Co., Defendant. No. 4982. In the matter of the division of attorneys' fees *our* of funds in court under decree dated July 5, 1916, filed July 6, 1916, on exceptions to Master's report. Application for Scire Facias. Paul Bakewell, Attorney in Patent Causes and Solicitor of Patents. Suite 1203-1208 LaSalle Bldg., 509 Olive Street, St. Louis, Mo. Filed Oct. 2, 1917. W. W. Nall, Clerk.

36 EXHIBIT "I" TO RETURN.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

In Equity. No. 4982.

MORGAN JONES, Complainant,

v.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

Motion for Order to Revive Cause by Substitution of Anna E. Bomar as a Party in Place of David T. Bomar, Deceased.

Comes now Anna E. Bomar, by Taylor and Chasnoff, her attorneys, and represents to the court that David T. Bomar died in Tarrant County, Texas, on September 22nd, 1917; that at the time of his death the said David T. Bomar was a resident of the City of Fort Worth, Tarrant County, Texas. That said David T. Bomar died testate; that the application to probate his will and for letters testamentary has been filed in the County Court of Tarrant County, Texas and that said application is now pending in said court; that said Anna E. Bomar has, by an order duly entered of record, been duly appointed temporary administratrix of the estate of said David T. Bomar, deceased, and been charged with the duty to take possession and charge of all the property of said estate wheresoever situated, and to collect and receipt for all moneys owing to said estate and to do any and all other things that may be necessary to properly care for and protect and preserve said estate, and authorized to do and perform all matters that may be necessary in order to obtain the portion of the attorneys' fees due to the estate of said David T. Bomar, deceased, earned in the case of Morgan Jones v. Missouri Edison Electric Company, including the power to appear in the court where said matter is pending, or to appoint an agent or agents and attorneys to represent said estate in said matter, and the said Anna E. Bomar has entered into a bond as required by said court, and duly qualified according to law as temporary administratrix of the estate of David T. Bomar, deceased, pursuant to said order.

37 Said Anna E. Bomar further shows to the court that by his will, the said David T. Bomar, deceased, after making a bequest of One Dollar to his son, bequeathed all of his property, including choses in action, to her, she being his widow, and named her as sole executrix of his will without bond.

Your petitioner states that the reason that she is now only a temporary administratrix and has not yet been appointed executrix under the will of said David T. Bomar, deceased, is that under the laws of Texas the matter of the probating of said will cannot be heard before the November Term, 1917, of said county court.

Your petitioner further states that said David T. Bomar left no property of any kind in the State of Missouri, subject to loss, waste, destruction or otherwise, or to administration under the laws of the State of Missouri.

Wherefore, the said Anna E. Bomar moves the court to revive the cause herein by substituting her as a party hereto in place of said David T. Bomar, deceased, and to permit her said attorneys to enter her appearance herein as such substituted party.

ANNA E. BOMAR,
By TAYLOR & CHASNOFF,
Her Attorneys.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 12th day of October, 1917, before me, a Notary Public within and for the City of St. Louis, Missouri, appeared Jacob Chasnoff, to me personally known, who being duly sworn, on his oath states that he has read the foregoing motion; that he is familiar with the matters therein referred to and that the statements of fact contained therein are true to the best of his knowledge and belief.

JACOB CHASNOFF.

Subscribed and sworn to before me this 12th day of October, 1917.

[Seal Grace E. Greve, Notary Public, City of St. Louis, Mo.]

GRACE E. GREVE,
Notary Public Within and for the City of St. Louis, Missouri.

My commission expires January 20, 1920.

38 [Endorsed:] No. 4982. In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones, Complainant, v. Missouri-Edison Electric Company et al., Defendants. Motion for Order to Revive Cause by substitution of Anna E. Bomar as a party in place of David T. Bomar, deceased. Taylor & Chasnoff, St. Louis. Filed Oct. 13, 1917. W. W. Nall, clerk.

39 EXHIBIT "I-1" TO RETURN.

THE STATE OF TEXAS,
County of Tarrant:

Know all men by these presents: That I, David T. Bomar, of the County of Tarrant and State of Texas, being of sound mind and memory and desiring to dispose of my worldly affairs while I have the health and strength so to do, I do make and publish this, my last will and testament and make the following bequests:

1st. I bequeath to my beloved son, William P. Bomar, the sum of One Dollar ($1.00).

2nd. I bequeath to my beloved wife, Anna E. Bomar all property, both real and personal, choses *and* action, etc. of which I may die possessed. My purpose, however, in so doing is not in any way to be construed as an intention on my part to leave my beloved son without any part of my estate except the bequest given him by Paragraph I hereof, but my said son, being the object around which the mutual affections of my said beloved wife and myself cling and feeling and possessing entire confidence in my beloved wife, it is my will and desire that she take my said estate to be used by her as she sees proper, believing that she will in all things properly provide for our said beloved son.

I appoint my beloved wife, Anna E. Bomar, sole executrix of this will without bond.

40 This is intended as an independent will under the laws of the State of Texas and I direct that there shall be no proceedings whatever hereunder except the probating of this will and filing of an inventory and appraisement thereunder.

Given under my hand, this the 29th day of March A. D. 1899 and I sign my name in the presence of John W. Broad, Mattie E. Broad and W. W. Purinton and request them to sign same as witnesses.

DAVID T. BOMAR.

We, the undersigned, have this day signed the last will of David T. Bomar in his presence and in the presence of each other at the special request of the said David T. Bomar on this the 30th day of March A. D. 1899.

MATTIE E. BROAD.
JOHN W. BROAD.
W. W. PURINTON.

Filed Oct. 3, 1917. W. H. Logan, County Clerk.

41 In re Estate of David T. Bomar, Deceased.

Court being in session on this 3rd day of October, 1917, came on for hearing the written application filed herein, of Anna E. Bomar to be appointed temporary administratrix of the estate of David T. Bomar, deceased; and

It appearing to the Court that David T. Bomar died in Tarrant County, Texas, on September 22nd, 1917, leaving an estate consisting of notes, stocks, bonds and other choses in action, and real estate, and that much of said estate is situated in Tarrant County, Texas;

And it appearing that application has been filed herein by Anna E. Bomar, the surviving wife of deceased, to probate his will, and for letters testamentary, which cannot be heard before the November term of this Court, and it appearing that the interest of said estate requires the immediate appointment of an administrator.

Now, therefore, it is hereby ordered by this Court, and by the Judge thereof, that Anna E. Bomar be and she is hereby appointed

temporary administratrix of the estate of David T. Bomar, deceased; and her duties shall be to take possession and charge of all the property of said estate wheresoever situated and to collect and receipt for all moneys owing to said estate, and to make releases of liens held by the estate on payment of the amount due thereon, to execute lease
contracts, procure policies of insurance on the property of said
42 estate; and to do any and all other things that may be necessary to properly care for, protect and preserve said estate.

In the matter of the adjustment of the attorneys' fees due to the estate of David T. Bomar, deceased, in the state of Missouri, earned in the case of Morgan Jones, et al., vs. Missouri-Edison Company, the said temporary administratrix is authorized to do and perform all matters that may be necessary in order to obtain the portion of said fee belonging to said estate, including the power to appear in the court where said matter is pending, or to appoint an agent or agents and attorneys to represent said estate in said matter; and she is hereby given power to make a compromise of said matter on such terms as she shall deem to the best interest of the estate.

This appointment shall continue in force until the day designated for the taking up of probate business at the first term of this Court held next after the date hereof.

This appointment shall not be delivered or take effect until the said Anna E. Bomar shall have taken the oath and given bond as required by law, such bond to be in the sum of Five Thousand ($5,000.00) Dollars.

Witness my official signature and the seal of said Court, attested by the Clerk hereof, this 3rd day of October, 1917.

JESSE M. BROWN,
County Judge, Tarrant County, Texas.

Letters of Temporary Administration.

THE STATE OF TEXAS,
County of Tarrant:

I, W. H. Logan, Clerk of the County Court of Tarrant County, Texas, do hereby certify that on the 3rd day of October A. D. 1917, Anna E. Bomar entered into a good and sufficient bond in the sum of $5,000.00 and qualified according to law as Temporary Administrator of the Estate of David T. Bomar, Deceased.

These are, therefore, given to prove her capacity to act as such.

Witness my hand and the seal of the County Court of Tarrant County, at Fort Worth, Texas, this, the 8th day of October A. D. 1917.

W. H. LOGAN, *Clerk,*
By W. H. TOLBERT, *Deputy.*

[Endorsed:] File No. 5128. Estate of David T. Bomar, Deceased. Letters of Temporary Administration. Issued the 8th day of October, A. D. 1917. W. H. Logan, Clerk

Clerk's Certificate of Official Character.

THE STATE OF TEXAS,
County of Tarrant:

I, W. H. Logan, Clerk of the County Court of said County (which is a Court of Record), do hereby certify that Jesse M. Brown, whose name is subscribed to the annexed Certificate was at the date of the same, and is now, County Judge in and for said County, duly commissioned and qualified, and authorized by law to administer oaths and take acknowledgments of instruments, and full faith and credit are due to all his official acts as such.

And I do further certify that the signature attached to the annexed Certificate is his proper signature and is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said County Court, at my office, in Fort Worth, Texas, this 8th day of October A. D. 1917.

[Seal County Court, Tarrant County, Texas.]

W. H. LOGAN,
Clerk of the County Court, Tarrant County, Texas.
By ELSIE WILSON, *Deputy.*

Clerk's Certificate of Official Character.

THE STATE OF TEXAS,
County of Tarrant:

I, Jesse M. Brown, Judge of the County Court of said County (which is a Court of Record), do hereby certify that W. H. Logan whose name is subscribed to the annexed Certificate was at the date of the same, and is now, County Clerk in and for said County, duly commissioned and qualified, and authorized by law to administer oaths and take acknowledgments of instruments, and full faith and credit are due to all his official acts as such.

And I do further certify that the signature attached to the annexed Certificate is his proper signature and is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said County Court, at my office, in Fort Worth, Texas, this 8th day of October, A. D. 1917.

[Seal County Court, Tarrant County, Texas.]

JESSE M. BROWN,
Judge of the County Court, Tarrant County, Texas.
By —— ——, *Deputy.*

43-4 I, W. H. Logan, Clerk of the County Court of Tarrant County, Texas, hereby certify that the foregoing is a true

and correct copy of the Will of David T. Bomar, deceased, and the Order of Court appointing Anna E. Bomar temporary administratrix of the estate of David T. Bomar, deceased, as same appears of record in the minutes of said Court; together with Letters of Temporary Administration issued to Mrs. Anna E. Bomar, and Certificates of Official Character of the County Clerk and County Judge of Tarrant County, Texas.

Witness my hand and official seal this the 8th day of October, A. D. 1917.

[Seal County Court, Tarrant County, Texas.]

W. H. LOGAN,
Clerk County Court, Tarrant County, Texas,
By ELSIE WILSON, *Deputy.*

45 EXHIBIT "J" TO RETURN.

In the United States District Court for the Eastern District of Missouri, Eastern Division.

No. 4982.

MORGAN JONES et al., Complainants,

vs.

UNION ELECTRIC LIGHT AND POWER COMPANY et al., Defendants.

Intervening Petition of Frank M. Slater, Public Administrator of the City of St. Louis Missouri.

To the Honorable the Judge of the District Court of the United States for the Eastern District of Missouri:

Frank M. Slater, respectfully represents that he is the duly elected, qualified and acting Public Administrator of the City of St. Louis, Missouri, and that he has been such since about the 1st day of January 1917. That by the law of the State of Missouri it is the duty of this petitioner in his said official capacity to take charge of the estate of deceased persons when money, property, papers or other estate are left in a situation exposed to loss or damage, or where from any cause the Probate Court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost. That on the 22nd day of September 1917, one David T. Bomar, a citizen of the State of Texas, then and at all the times hereinafter mentioned domiciled in said State, departed this life in the State of Texas without leaving any heirs or persons next of kin, or any devisee or legatee, or other person, in the State of Missouri competent to administer upon his estate in Missouri. That for a long time heretofore
46 the above entitled cause has been pending in this court and

that heretofore such proceedings have been taken and had therein that the complainants recovered from the defendants, or some of them, a large sum of money, out of which there was set aside and awarded to the attorneys for the complainants, as counsel fees, the sum of Ninety five Thousand Seven Hundred Seventy and no/100 ($95,770.00) Dollars. That the said attorneys, among whom was the said David T. Bomar, were unable to agree among themselves upon a division of the said fund or sum of money, or upon the respective proportions of the same to which each was entitled, and that thereupon the said matter and the just and equitable division of the said fund among the said attorneys, was by the order of this court referred to a Master in Chancery for hearing and determination; that the said Master, on the 13th day of July 1917, duly reported to this court his finding thereon, to which in proper time exceptions were taken and filed; and that the said exceptions are and ever since have been pending in this court undetermined. That the said exceptions were directed against the amount awarded to the said David T. Bomar out of the aforesaid fund, and if sustained, or otherwise favorably acted upon, would operate to cut down or diminish the amount which the said Bomar would receive out of the said fund, whereby the interest of the said Bomar in the said fund became and was in jeopardy and the same still remains so exposed. That the said fund was about the 17th day of July 1916 by the order of this court deposited, pending the final disposition of the said exceptions, in the State National Bank, a banking corporation, doing business in the City of St. Louis, Missouri, and that the same ever since has been and still is in the possession of the said bank and located in the said City and State, and that at and before the date of his death as aforesaid the said Bomar had earned and there was due to him an interest in the aforesaid sum of money, and that his interest
47 in the said fund had never been by him in any manner disposed of or alienated. That upon receiving information of the death of the said Bomar as aforesaid, and of the jeopardy in which the interest of the said Bomar in the said fund was placed by reason of the pendency of the said exceptions, this petitioner, in his said official capacity, did on or about the 26th day of September 1917 take charge of the estate of the said David T. Bomar, deceased, in the State of Missouri in the manner and form required by the laws of the said State; and that thereafter, to-wit, on the 5th day of October 1917, the probate Court of the City of St. Louis, Missouri, a court of record to which exclusively is committed by the laws of said State all matters pertaining to the granting of letters testamentary and of administration and the management, care and control of the estate of deceased persons who at the time of death had any right, title or interest in or to real or personal property within the said City of St. Louis, did make and render an order and judgment, and enter the same upon its records, wherein and whereby it found and determined to be true the facts aforesaid as to the death of the said Bomar and as to the non-existence in the State of Missouri of any person or persons competent under the laws of the

said State to administer upon his estate in Missouri; and further found and determined that the aforesaid fund or sum of money was and is actually on deposit in a national bank in the said City of St. Louis; that the interest of the said deceased was and is in danger of being diminished or impaired unless there be some person duly authorized and empowered to appear for and represent the estate of the said deceased; and that it was and is necessary and desirable that there be administration upon the said estate in Missouri; and did appoint this petitioner in his said official capacity administrator of the estate of the said David T. Bomar, deceased, in Missouri, and
48 did direct and require him to proceed to take charge of and administer upon the goods, chattels and choses in action of him, the said deceased, in Missouri, a certified copy of which order and judgment is hereto attached marked "Exhibit A."

That by reason of the matters and things aforesaid and in virtue of the said order and judgment of the Probate Court of the City of St. Louis, Missouri, this petitioner is the sole and only legal representative of the said David T. Bomar, deceased, in Missouri, and the only person legally authorized to represent the estate of the said deceased in this or any other cause pending within the limits and boundaries of the State of Missouri.

Wherefore, this petitioner as administrator of the estate of David T. Bomar, deceased, in the State of Missouri, prays that the exceptions now pending as aforesaid to the report of the Master hereinbefore mentioned finding and determining the proportion of the said fund to which the said Bomar was entitled, be overruled, and that the said report be in all things confirmed and approved; that judgment be entered upon the said report of the Master awarding to this petitioner as administrator in Missouri of the estate of David T. Bomar, deceased, the amount therein found to be due to the said Bomar, with such interest as may have accrued thereon, and ordering and directing the person or persons in custody of the said fund to pay the same over to this petitioner within a time to be fixed by this court, and that this petitioner may have such other and further orders, decrees and relief in the premises as may be necessary and requisite and agreeable to equity and justice.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Solicitors for said Petitioner.

49 "EXHIBIT A."

STATE OF MISSOURI,
City of St. Louis, ss:

In the Probate Court within and for the City of St. Louis, State of Missouri, September Term, 1917.

Estate of DAVID T. BOMAR.

Order to Administer.

Friday, October 5, 1917.

It appearing to the Court that David T. Bomar, deceased, late a resident and citizen of the State of Texas died on the 22d day of September 1917, leaving an estate in the City of St. Louis, Missouri, consisting of an interest in a sum of money now on deposit in the State National Bank of the said City of St. Louis, and that the extent of the interest of the said deceased is dependent upon the result of certain litigation now pending, and that by reason thereof the same is liable to be diminished or otherwise impaired, wasted or injured unless there be some person duly authorized to appear for and represent the interest of the said deceased in the said litigation; that said deceased left no widow, devisee, legatee or other person in the State of Missouri capable of administering: And it further appearing to the Court that it is necessary and desirable that administration be had on the said estate in Missouri, and that Frank M. Slater, Public Administrator of the said City of St. Louis, has in his official capacity filed in the office of the Clerk of this Court a notice that he has taken charge of the estate of the said David T. Bomar, deceased, in Missouri, it is ordered and decreed that the said Frank M. Slater, Public Administrator as aforesaid, be and he is hereby directed to take charge and possession and administer upon the estate of the said deceased in the City of St. Louis, Missouri.

STATE OF MISSOURI,
City of St. Louis, ss:

I, George Brand, Clerk of the Probate Court within and for the City of St. Louis aforesaid, do hereby certify the foregoing to be a true copy of the order of Court entitled "Order to administer" in the matter of the estate of David T. Bomar, deceased, as fully as the same appears of record in my office.

In witness whereof, I hereunto set my hand and affix the seal of said Court, at office, in St. Louis, this 5th day of October 1917.

[Seal Probate Court of the City of St. Louis, Missouri.]

GEORGE BRAND, *Clerk.*

50 [Endorsed:] No. 4982. In the U. S. District Court, Eastern District of Missouri, Eastern Division. Morgan Jones et al., Complainants, vs. Union Electric Light & Power Company, et al., Defendants. Intervening Petition of Frank M. Slater, P. A. City of St. Louis, Missouri. Wells H. Blodgett, George B. Webster, Henry W. Blodgett, Walter N. Fisher, Solicitors for Petitioner.

51 EXHIBIT "K" TO RETURN.

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4982.

MORGAN JONES, Complainant,

vs.

UNION ELECTRIC LIGHT & POWER COMPANY et al., Defendants.

Brief in Behalf of Frank M. Slater, Public Administrator of the City of St. Louis, Missouri.

The facts which gave rise to the present controversy are these: Prior to July 1916 the issues between the complainant and the defendants had resulted in a recovery by the complainant and the intervening petitioners of a large sum of money, and an amount of money, approximating $100,000.00, was by finding of a Master awarded as attorneys' fees for the counsel of complainant and the intervenors. A controversy having arisen between these counsel as to the division of the fund between them and as to the value of the services which they had severally rendered, the latter questions were referred to another Master, who made a report apportioning the counsel fees among the several attorneys interested. To that report both Mr. Bomar and the firm of Thompson and Thompson filed exceptions, which are still pending undetermined.

When it appeared that a controversy had arisen between counsel as to the division of the fund the money was paid into court,
52 and by appropriate order the court directed the clerk to deposit it in the State National Bank in the City of St. Louis, Missouri, where it still remains.

On September 22nd, 1917, while the exceptions referred to were still pending undetermined and while the fund still remained on deposit in the Bank, Mr. Bomar, who then and for a long time theretofore had been a resident of the State of Texas and domiciled in the City of Fort Worth, suddenly died. On the 27th day of September 1917, Frank M. Slater, who was then the duly qualified and acting Public Administrator of the City of St. Louis, having been advised of the death of Mr. Bomar and the fact that he was interested in the said fund and that the question of his interest therein was drawn into issue by the pending exceptions, proceeded in accordance with the law of the State of Missouri (Section 302

R. S. Mo. 1909) to file a notice with the clerk of the Probate Court of the City of St. Louis that he had taken charge of the estate of Mr. Bomar in Missouri in his official capacity and under his official bond. On October 5th, 1917, the Probate Court of the City of St. Louis, to which by the law of the State is committed exclusive jurisdiction over the appointment of executors and administrators, (Section 34, Article VI, Constitution of Missouri) confirmed his action in so doing and entered of record an order and judgment in the following form:

"It appearing to the Court that David T. Bomar, deceased, late a resident and citizen of the State of Texas died on the 22nd day of September 1917, leaving an estate in the City of St. Louis, Missouri, consisting of an interest in a sum of money now on deposit in the State National Bank of the said City of St. Louis, and that the extent of the interest of the said deceased is dependent upon the result of certain litigation now pending, and that by reason
53 thereof the same is liable to be diminished or otherwise impaired, wasted or injured unless there be some person duly authorized to appear for and represent the interest of the said deceased in the said litigation; that said deceased left no widow, devisee, legatee or other person in the State of Missouri capable of administering: And it further appearing to the Court that it is necessary and desirable that administration be had on the said estate in Missouri, and that Frank M. Slater, Public Administrator of the said City of St. Louis, has in his official capacity filed in the office of the Clerk of this Court a notice that he has taken charge of the estate of the said David T. Bomar, deceased, in Missouri, it is ordered and decreed that the said Frank M. Slater, Public Administrator as aforesaid, be and he is hereby directed to take charge and possession and administer upon the estate of the said deceased in the City of St. Louis, Missouri."

A duly certified copy of this order is attached to the Public Administrator's intervening petition, which he sought leave to file and which is herewith submitted for the consideration of the court.

On learning the death of Mr. Bomar certain exceptors (Messrs. Thompson and Thompson) by their counsel suggested his death in open court in this proceeding on October 1st, 1917.

On the 8th day of October 1917 a will was exhibited in the County Court of Tarrant County, Texas, and was there filed, but by the law of Texas (Sections 3256-3261 R. S. 1911) a will can not be admitted to probate until after the return of a citation at the next term of court, which in this case is November 1917. According to the Texas practice a temporary administrator was appointed and Mrs. Bomar, who is named in the will as executrix and legatee, was given such an appointment.

54 The contentions of the Public Administrator are as follows:

First. That the interest of Mr. Bomar in the undistributed fund constitutes assets within the State of Missouri which are subject to administration there, and that the judgment of the Probate Court in

so finding and directing him to administer is conclusive and can not be attacked collaterally.

Second. That his rights accrued when he filed his notice on September 27th, 1917, and were consummated by the judgment of October 5th, 1917 of the Probate Court, and that therefore his rights are superior in point of time to any person claiming an appointment by the court of another State after that date.

Third. That any executrix or administratrix, temporary or permanent, appointed by the courts of Texas, has no official character outside the State of Texas and can not appear and participate in that capacity in a foreign jurisdiction.

Fourth. That the widow can not voluntarily appear in the litigation and represent the interest of the estate, since if the fund constitutes assets in Missouri it is personal property and passes to the administrator rather than to the legatees named under the will.

The contention of the opposite side seems to be reducible to two propositions: First, that a fund of money which is in the control of a Federal Court, even though deposited in a bank within the territorial jurisdiction of that court, does not constitute assets subject to administration by an administrator appointed under the authority of that State. Second, that since the widow is the principal beneficiary under the will, and also named as executrix, she ought on the strength of her position in Texas to be admitted as a party litigant in this court.

We will first attempt to justify the points made in behalf of the Public Administrator and to exhibit the authority of law
55 upon which they are based; then we will proceed to the statement of our reasons why we think the contrary contentions are unsound.

I.

Mr. Bomar's interest in the fund in question was at the date of his death a chose in action existing within the State of Missouri and payable out of the deposit made under the order of this court upon a cheque on the bank in which it was located, signed by the Judge and Clerk of this court. It is conceded that this fund was on deposit in a national bank in the City of St. Louis. The situs of this fund was therefore here; Mr. Bomar's rights in it accrued and would or will be determined here, and the payment of the fund to him, or some representative of his estate, will be made here. Every chose in action must have a situs some place. It can not, like Mahomet's coffin, be suspended between heaven and earth, and though it be true that its situs for one purpose may be one place and its situs for another purpose in still another place, we are concerned only in this case with its situs for the purpose of distribution. It can not be said that it is in Texas for it did not accrue there and is not payable there. If it is not within the State of Missouri perhaps opposing counsel can suggest some jurisdiction in which it may be said to exist.

It can not be otherwise merely because the fund is under the

control of the officers of this court, for if that were true then the mere fact of the control of the fund would determine its position rather than the place in which it was deposited; and it would be but a step further to say that a fund of money in East St. Louis, which could not be paid out except upon the approval of the Probate Court of the City of St. Louis, was in fact situated in Missouri.

56 However, we need not resort to the process of original reasoning since there is adjudicated authority on the subject. The point was directly passed upon and ruled as contended by the Public Administrator by the Circuit Court of Appeals of the First Circuit in the case of United States v. Tyndale, 116 Fed. 820, where it was unequivocally ruled that the unclaimed assets of a decedent which are in the custody of the United States District Court are subject to administration by an administrator appointed by the court having probate jurisdiction in the State in which the district court is sitting. The case involved conflicting claims between the United States and the Public Administrator appointed by the Probate Court of Suffolk County, Massachusetts, to the remaining balance of certain personal property found on the body of a deceased person floating in the high seas, out of the territorial jurisdiction of any particular State and of the United States. This property was brought into port by the salvors and libeled by them for salvage, and the amount in dispute was the balance remaining in the registry of the District Court after the claim of the salvors had been satisfied. By leave of court both claimants intervened in the District Court, and that court ordered the fund paid to the Public Administrator, whereat the United States appealed. It was urged by the Government, among other things, that a fund in the registry of a Federal Court was not subject to administration under state laws. In ruling that contention to the contrary the court said: (l. c. 824.)

"So far as the other proposition is concerned, we think it is fully met by the broad rule that a fund which is in the registry of a Federal Court sitting ordinarily or always in any particular county in the district and State of Massachusetts, is a fund in each and every county, and may properly be administered on in any county, unless there is some restriction in a particular case growing out of some special matter; as, for instance, the residence of the deceased or the priority of application to some particular Probate Court."

On the same page the court, referring to the contention that the United States only could determine the disposition of

57 the fund, said:

"This is palpably so (unsound) because, if otherwise, it would bring us face to face with a like proposition that the existence of a fund in the registry of a Federal Court in the district and State of Massachusetts could, under no circumstances, give jurisdiction for administration, whether to a resident of the State or to a foreigner."

This seems to sustain the first proposition advanced by the Public Administrator in this case and its authoritative effect is not minimized by such decisions as counsel on the other side quote, where the

fund in question was represented by the draft of a sub-treasury on the treasury of the United States at Washington. Such cases are entirely different because they concern a debt, or the evidence of a debt, due from the United States. The general proposition which they advance, that the fund in which Mr. Bomar has an interest is a debt due from the United States, is wholly unsound, as may be seen by mere reflection upon what would happen if Mr. Bomar in his lifetime had undertaken to sue the United States for the recovery of his interest.

The order of the Probate Court above quoted was a judicial determination of the existence of assets within the State of Missouri and of facts under which the Public Administrator was entitled to take charge of the Bomar estate. It was a judicial determination of the existence of all jurisdictional facts, as was held of a similar order in Simmons v. Saul, 138 U. S. 451 l. c. As such it is not subject to collateral question in any other court, since it is the settled doctrine in Missouri that the authority of a Public Administrator to take charge of an estate can not be assailed collaterally.

Dunn v. German American Bank, 209 Mo. 90;
Richardson v. Bush, 198 Mo. 184;
Vermillion v. Le Clare, 89 Mo. Ap. 55;
Wyatt v. Wilhite, 192 Mo. Ap. 551.

And the federal courts sitting in Missouri recognize and follow that rule.

58 American C. & F. Co. v. Anderson, 212 Fed. 309, l. c.

The latter case is a decision by the Circuit Court of Appeals in this circuit.

In another and more recent case the doctrine of Simmons v. Saul, supra, to the effect that the appointment of Slater was a judicial determination of jurisdictional facts which can not be drawn into question in a collateral proceeding was followed.

Dayton C. & I. Co. v. Dodd, 188 Fed. 597.

II.

Under Section 305, R. S. Mo. 1909, when the Public Administrator filed his notice in the Probate Court of the City of St. Louis his character as administrator of the Bomar estate was established and he was then in charge of it in his official capacity and under his official bond. Of course his position as administrator was subject to such action as the Probate Court might take in the way of revoking his authority if it should appear that the circumstances under which he acted did not justify his action, under the decision in McCabe v. Lewis, 67 Mo. 296, and cases of cognate nature. He held by that uncertain tenure until October 5th, 1917, when the Probate Court examined into the circumstances and upon consideration of the facts made a finding that he had acted properly and that the conditions upon which he is entitled to act under the law of the State of Missouri were in existence at the time he filed his notice. As already shown this judgment is not subject to ques-

tion here, and it therefore follows necessarily that by the latter judgment his character and relationship to the Bomar estate was definitely and finally determined and concluded, at least until that judgment is arrested or set aside in a direct proceeding.

59 III.

It is well settled in the law of the State of Missouri that a foreign administrator derives his authority solely from the laws of the State in which he is appointed, which laws have no extra-territorial effect, and that therefore he can not sue in his representative capacity in the Missouri courts.

McPike v. McPike, 111 Mo. 216;
Sommers v. Franklin Bank, 108 Mo. Ap. 490;
Miller v. Hoover, 121 Mo. Ap. 568.

A foreign domiciliary administrator gets no title to personal property located in the State of Missouri and can not sue for it nor defend it.

Crohn v. Clay County Bank, 137 Mo. Ap. 712.

This Missouri rule is in full accord with the general doctrine elsewhere. Judge Woerner says:

"No executor or administrator can in his official capacity originate or maintain an action in the courts of any country save that which has granted him letters testamentary, or of administration, without authority from the country in which he brings action, nor collect rents or in any manner intermeddle with the property of the deceased in such country. The strict correlative of this proposition is that no executor or administrator can be subjected to an action in his official capacity in the state or country in which he is not recognized as such."

1 Woerner, Admr. (2nd Ed.) Sec. 160.

If as seems certain from the foregoing authorities *that* the Texas executrix under the Bomar will could not sue in the Missouri courts in that capacity, it is equally true that she could not be a party defendant and so would not be in a position to appear in this litigation in behalf of the estate.

The rule that a foreign executor or administrator can not sue or be sued outside the state of appointment is recognized and followed by the federal courts.

60 Johnson v. Powers, 139 U. S. 156;
Eels v. Holder, 12 Fed. 668;
Mills v. Knapp, 39 Fed. 592;
Black v. Allen Co., 42 Fed. 618;
Allen v. Fairbanks, 36 Fed. 402;
Moore v. Petty, 135 Fed. 668;
Courtney v. Pradt, 135 Fed. 818;
Graham v. Lybrand, 142 Fed. 109;
Beaumont v. Beaumont, 144 Fed. 288;
Watkins v. Eaton, 183 Fed. 384;
Dodge v. N. Hudson, 188 Fed. 489;
Mattison v. B. & M. R. R., 205 Fed. 821.

This excludes the Texas executrix of Mr. Bomar from appearing in this court in this litigation.

IV.

The last cited authorities dispose of the widow's right to appear in this litigation and defend the interests of the Bomar estate in a representative capacity. No more can she do so in her capacity as legatee, because by the settled law of both Missouri and Texas money is personal property and passes to the administrator or executor rather than to the heirs, as does real estate. So elementary is this proposition that citation of authority upon it is unnecessary. As the record shows that Mr. Bomar's interest in the fund in question is more than would be allowed her as her absolute property she can have no title to it except upon the decree of distribution in accordance with the terms of the will. There is no presumption that Mr. Bomar died leaving no debts in Missouri any more than there is that at the time of his death he was a rich man or a poor man or belonged to any particular religious denomination.

In Murphy v. Menard, 14 Tex. 62, it was held that lapse of a long time after death, together with other circumstances, may raise a presumption that all existing debts against an estate are barred or paid and that the assets remaining belong to the heirs, but it is not thought that this can be helpful to the other side in this case, because the presumption is based upon lapse of time, while here less than thirty days have elapsed since the death and there
61 yet remains a long period of time within which claims may be forthcoming. A diligent search of the authorities fails to disclose any which hold that any presumption of non-indebtedness arises or exists until after the period for proof of claims has elapsed.

It is respectfully and earnestly submitted that the foregoing propositions are fully sustained by the great weight of judicial authority and that they lead inevitably to the conclusion that the Public Administrator of the City of St. Louis, Missouri, is properly in charge of the Bomar estate and such assets of it as exist in Missouri, and that therefore he is the only person entitled to appear and represent the estate in this case.

Coming now to the contentions of opposing counsel, as to the first it need only be said that the authorities cited under paragraph I of this brief, and particularly the case of Tyndale v. United States, 116 Fed. 820, disclose the fundamental unsoundness of the contention they advance. As to the second, there are two all-sufficient answers; one of these is that she has no real character as legatee or beneficiary in virtue of the will itself; she gets that from the order of distribution, for the formation of which the will is the mere direction. What we have already said as to the absence of any presumption of non-indebtedness applies with equal force to this argument. Moreover, under the law of the State of Texas, she has no character whatsoever except so far as she might be considered a mere temporary custodian of the assets of the estate in Texas in the

nature of a temporary receiver. The statutes of Texas relating to administration permit the filing and temporary probate of the will, but they require a citation to be issued returnable at the next term of the county court which begins ten days after the date of citation, which in this case happens to be in November. No letters of administration or letters testamentary are granted until after
62 the return day of that citation, as of course would not be possible because the will is not formally probated until that time. These provisions are found in sections 3247 to 3266, inclusive, of the Revised Civil Statutes of Texas, 1911. As the situation exists at present neither she nor the will have any official character, because when the return day of the citation comes somebody may appear and defeat the probate of the will, or the court may appoint some other person as administrator with the will annexed. Hence to give her any rights in this litigation would be to anticipate the decision of the County Court of Tarrant County, Texas, in her favor and in favor of the will. Moreover, since by settled principles of equity jurisprudence he who is prior in time is prior in right, it would seem to follow that Slater, whose appointment as administrator of the estate in Missouri has received the judicial approval and sanction of the Missouri courts, should be recognized by this court rather than a citizen of Texas, the courts of whose domicile have not yet given her any permanent official character.

It is true also that the document offered in evidence in this court as the will of the late Mr. Bomar is not admissible in its present form because not certified according to the act of Congress. This, however, is a mere technical objection which we are not at this time urging, since if the paper be what it purports to be the required certification is merely a matter of a few days' time. The paper as it exists is nothing at all, but, as stated, we do not place our claim on such narrow grounds.

In submitting these arguments for the consideration of this court we do so in the sincere belief of their soundness. It is not the desire of our client, nor of ourselves, that he or we should have
63 any benefit or advantage to which we are not justly and legally entitled. It is not his purpose, nor is it ours, to step in where we do not belong nor to intrench upon the legal rights of others, but he and we have a legal duty to perform which it is our desire and our purpose to fully perform, and which to us is as important as the discharge of the court's duty is to it.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Attorneys for Frank M. Slater, Public Administrator of the City of St. Louis, Missouri.

64 [Endorsed:] No. 4982. In the U. S. District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Morgan Jones, Complainant, vs. Union Electric Light & Power Company, et al., Defendants. Brief in Behalf of Frank M. Slater, Public Administrator of the City of St. Louis, Mo. Wells H. Blodgett, George B. Webster, Henry W. Blodgett, Walter N. Fisher, Attorneys for Frank M. Slater, Public Administrator, City of St. Louis, Missouri.

65 EXHIBIT "L" TO RETURN.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4982.

MORGAN JONES, Complainant,

v.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

In the Matter of Division of Attorneys' Fees.

The motion of Mrs. Bomar, who is the Texas Administratrix, to be substituted as a party should be sustained and the application of Messrs. Thompson and of Mr. Frank M. Slater should be denied. The Public Administrator, who has assumed to take charge of Mr. Bomar's interest in the fund in court should not be recognized.

Public Administrator is Without Authority Because this Fund is Not Subject to Loss, Waste or Destruction.

We have already indicated to the Court in oral argument that it is our view that under the Missouri statutes the Public Administrator has no right to take charge of an estate of a deceased person which is not subject to loss, waste or destruction. The authorities amply sustain this proposition.

Section 302 R. S. Mo. 1909 defines when it shall be the duty of the Public Administrator to take charge of estates of deceased persons as follows:

"* * * when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same * * * where from any other good cause, said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost.

This language of the statute itself ought to be sufficient to make it perfectly clear that the St. Louis Public Administrator has no jurisdiction to take charge of any part of Mr. Bomar's estate. The affidavit in the case shows and it is not controverted, that Mr. Bomar left no assets subject to administration in the State of Missouri, unless it be the interest of Mr. Bomar in the fund in this
66 court. It goes without saying that this fund is in such a position that it cannot be lost, wasted or destroyed, as it is al-

ready under the protection of this Federal Court, which is an agency of the United States Government for the administration of justice.

The case of Troll v. Landgraf, 183 Mo. App. 251 (St. Louis Court of Appeals 1914) squarely decides this proposition. That case holds that the above statute excludes the Public Administrator from taking charge in any case other than those mentioned in the statute, and that was a case in which there was no question but that the situs of the property of which the Public Administrator had assumed to take charge was in the State of Missouri.

The facts in the case just cited were as follows: Joseph Landgraf, resident in Illinois, died there in 1910 and his son Phillip administered there. Among the assets were debts due from persons residing in Missouri, payable in St. Louis, and secured by deeds of trust on real estate in St. Louis. Prior to approval of final settlement in Illinois, the Public Administrator in St. Louis filed notice that he had taken charge. On a petition by Philip Landgraf to the Probate Court of St. Louis to vacate the authority of the Public Administrator, the court did so. On appeal to the Circuit Court, the judgment of the Probate Court revoking the authority was affirmed, but afterwards on motion the Circuit Court granted a new trial on the ground that a chose in action, claim or demand, may be entirely lost if its enforcement were delayed. On appeal to the St. Louis Court of Appeals it was held that the Circuit Court erred in granting a new trial; that upon the record the property was not exposed to loss or damage and consequently the Public Administrator was nothing but an officious intermeddler.

In that case, as in the case at bar, the Public Administrator laid much stress upon the question of the situs of the property of which he had assumed to take charge, but the court disposed of that contention in this language:

"The solution of this question does not depend upon whether these debts technically have their situs within this state or otherwise, but is to be determined by looking alone to the statute conferring authority upon the Public Administrator to take charge of estates."

Speaking of the office of Public Administrator, the court said (page 257):

67 "And manifestly it was not intended that such officer should have the power or authority to take into his possession property belonging to foreign testators or intestates, except under the conditions plainly set forth in the statute.

The court squarely held that under the evidence to the effect that the notes evidencing the indebtedness and deeds of trust securing the same were in the hands of those entitled thereto, who were fully aware of the situation and amply able to look after their own interests, the record negatived the idea that the property was exposed to loss or damage, or liable to be injured, wasted or lost, and therefore concluded that under the facts the Public Administrator was not entitled to take charge of the estate.

It was urged in that case, as it is in effect urged in this, that the

personal property of the foreign intestate passed to the ancillary administrator and that the title thereto can be derived only through the latter. On this point the court said:

"As to this it may be said that those beneficially interested therein have the equitable title thereto. And the courts of this state (to say nothing of like cases in other jurisdictions) have in many instances recognized the right of distributees to take title to personal property even though no administration be had." (Citing cases.)

(In connection with the last suggestion under discussion, we would also refer the Court to Article 3235 Texas Civil Statutes 1914, of which this court will take judicial notice, that under the laws of Texas, property vests in legatees, devisees or heirs at law on the death of any person and that under the Texas law his executors or administrators have merely a right of possession, and do not take title as suggested by counsel for the Public Administrator. And that the law of the domicile governs devolution of personal property is a proposition which needs no citation of authority.) In the course of its opinion in the above case, the court also said:

"* * * It would appear to be altogether unreasonable to suppose that the law contemplates that the Public Administrator must be permitted to take charge of assets of an estate upon the theory merely that they have a technical legal situs in this state against the wishes of those interested, and where he would in truth be nothing but a naked passive trustee, with no duty to perform except to take property into his possession, hold it during the period of administration, and then return it to those who are rightfully entitled to it, less his fees and expenses.

68 "It cannot be that the law contemplates that foreign administration of this sort, ancillary in character, may be enforced upon those interested in an estate, against their will, when, as here, no necessity has arisen therefor. And we think it altogether clear that our statute has purposely limited and restricted the authority of the Public Administrator so as to prevent this very thing."

We think the above case is decisive upon the right of the public administrator in the case at bar. Under the statute he had no right to and could not take charge of Mr. Bomar's interest in a fund which is under the protection of this Federal Court. Such a fund is not in a position where it is subjected to loss, waste, injury or destruction.

On the Subject of Collateral Attack.

But it is urged by the Public Administrator that his authority cannot be collaterally attacked. He urges that merely by the filing of his notice that he has taken charge of an estate, his right in the premises in a case pending in the Federal Court is thereby conclusively determined. But he goes further and announces that since the Public Administrator's action in assuming to take charge, the Probate Court of St. Louis has confirmed his action.

The Probate Court of the City of St. Louis is not a court of general jurisdiction. As said by the Supreme Court of Missouri in the very cases cited by the Public Administrator's counsel as sustaining the

proposition that his authority cannot be collaterally attacked, (which by the way, did not decide any such general proposition) the Probate Court is a court of special and limited jurisdiction and not a court of general jurisdiction.

It is conceded that Frank M. Slater is the Public Administrator *is the Public Administrator* and we are not questioning the fact that he is the Public Administrator. We do, however, question his title to property of which he has assumed to take charge.

And so in the case of Richardson v. Busch, 198 Mo. 174 l. c., the court said, referring to the Probate Court:

"If the property is not here so that it can be reached by the process of a court of general jurisdiction, how can it be taken hold of by a court of limited or special jurisdiction."

69 And in that case the court, in a suit brought by the Public Administrator for conversion, refused to recognize his right to take charge of those assets, although it is true the court did say that this did not constitute collateral attack.

In the case of Bell v. Farmers and Merchants Bank, 188 Mo. App. 383, decided by the St. Louis Court of Appeals in 1915, the court denied the right of an administrator in an action by him in the Circuit Court for the value of property belonging to the deceased, which had been paid by the defendant bank to the heirs at law. The point was made that to deny the right of the Administrator constituted collateral attack, but the court said:

"It is true that the appointment of plaintiff as Administrator is not subject to collateral attack in this action; but to deny plaintiff the right to possession of the property under the circumstances is not a collateral attack upon the order and judgment of the Probate Court directing him to take charge of the estate, but a determination by a court of equitable cognizance that he was not entitled to the possession of this property."

It is to be noted that in the case just cited the point was also made that the heirs could acquire no title except through the Administrator, a point which is insisted on by the Public Administrator's counsel in the case at bar at page 10 of his brief, and that in that case also the Administrator made the plea that there might be debts in this state. Of the latter proposition the court said:

"It is true that it is not possible to know with certainty that the deceased left no debts, but it is sufficient on that score if none have appeared, and that the Administration is not had in order to enable a creditor to reach the assets."

And while we are on that point, we may as well furnish the public Administrator's counsel with the authority which they say (p. 11) their diligent search has failed to reveal to them on the point that in the absence of affirmative proof of debts, there is a presump-

70 tion that there were no debts against the estate of a decedent. The most recent case on the subject is the case of In re Van Kleek, 158 N. Y. S. 539, and the subject is digested in Decennial Digest and Key Number Series under "Executors and Administrators, Section 3 (5).

Proper Party to Be Substituted.

But even if his official position as Administrator cannot be collaterally attacked, the question for this court to determine is, "Who is the proper party to be substituted for Mr. Bomar?" Even if we concede for the purpose of argument that Mr. Slater is Public Administrator of St. Louis, and even if we assume that he has taken charge of any estate belonging to Mr. Bomar, it does not follow that this Court must recognize him as the proper party to be substituted in this equity cause. Counsel for Public Administrator urges as one of his contentions that his rights are superior in point of time.

We do not apprehend that this Court is going to decide on who is the proper party based solely on the question of who first was appointed Administrator, or on who first asked this Court to be substituted in Mr. Bomar's place. However, if these facts are to be given any significance, we call the Court's attention to the fact that Mrs. Bomar was appointed Administratrix on the 3rd day of October, 1917, whereas the order of the Probate Court of St. Louis is under date of October 5th, 1917. Also the motion for substitution filed on behalf of Mrs. Bomar bears the filing stamp of this court of October 13th, 1917, while the application of the Public Administrator for leave to intervene was not filed until October 15th, 1917.

The application for writ of scire facias to which is attached a copy of the notice of the Public Administrator that he had taken charge is not entitled to any consideration whatever. In the first place, as we have shown, under the facts proved and admitted in this case, the action of the Public Administrator was a nullity. In the second place, counsel for the Messrs. Thompson have adopted a mistaken mode of procedure in attempting to obtain a writ of scire facias and to revive the cause in that manner. Their action is taken under Section 956 of the Revised Statutes (U. S. Compiled Statutes 1916, Section 1593). That statute is not applicable to suits in equity, but only to actions at law. See cases cited in Note 17 to this sec-
71 tion, Volume 3 U. S. Compiled Statutes 1916, page 3201.

The proper procedure in this case is to revive the cause upon motion by substitution of the proper parties. In R. S. Section 913 (U. S. Compiled Statutes 1916, Section 1536), the Supreme Court promulgated its rules, and among those is Rule 45, which covers this case and which provides, "In the event of the death of either party, the court may in a proper case upon motion order the suit to be revived by the substitution of the proper parties.

It is left to the sound discretion of this court as to who should be appointed as a proper party to be a substitute for Mr. Bomar. We submit that the domiciliary representative, Mrs. Bomar, is the proper party and should be substituted.

But it is urged against Mrs. Bomar that she is only a temporary administratrix. Having judicial knowledge of the laws of Texas, this Court knows and it is admitted that no other administratrix can be appointed in this case because of the fact that under the Texas law, Mr. Bomar's will, in which he leaves everything to Mrs. Bomar and

appoints her executrix without bond, cannot be probated before November, and we have made affidavit to this effect, which is set out in our motion, and the fact is set up in memorandum of opposing counsel. This is no reason then why Mrs. Bomar should not now be substituted, because any such reason applies with equal force to the Public Administrator or any administrator who might now be appointed in Missouri. This is so because Section 305 R. S. Mo. 1909 is to the effect that where a will is proved after the granting of letters of administration, the letters are thereby revoked, and the case of In re Estate of Brinckwirth, 266 Mo. 473 (1916) holds that the authority of a Public Administrator who has taken charge of a supposedly intestate estate ceases when a will is proved.

Counsel for the Public Administrator relies very strongly on the case of United States v. Tyndale, 116 Fed. 820. It is to be noted, however, first that the question of situs of the property in the case at bar is immaterial in view of the fact that under the Missouri law the Public Administrator has no right to take charge because the fund is not in danger of loss; second, that the case cited was a contested case only on the proposition of the right of the United States to claim the fund, but was uncontested so far as the Public Administrator's
72 right was concerned; third, because the property out of which the fund arose was actually brought into the State of Massachusetts after the death of the deceased and before it came into the hands of the Federal Court; and fourth, it did not appear that the deceased was not a resident of the State of Massachusetts or of the Public Administrator's county. Furthermore, the court in that case qualified the proposition that a fund in the registry of a Federal Court is a fund in each and every county, with the following language:

"unless there is some restriction in a particular case growing out of some special matter, as for instance, the residence of the deceased, or the propriety of application to some particular probate court."

To the suggestion that a foreign administrator has no place in a Missouri court, we would respectfully call the court's attention to Section 1737 R. S. Mo. 1909 to the effect that a foreign administrator or executor may sue in this state to recover property of the testator, and the cases so hold. It is not an infrequent occurrence in this court for a foreign administrator to be permitted to bring his suit for damages here, and no citation of authority is needed for the proposition that where the foreign administrator first appears in this court, the local administrator will not be recognized. Moreover, it is well settled law that a foreign representative may sue to collect a claim where under the law of the state where the action must be brought, the claim cannot be made the subject of local administration, since in such cases the reason for the rule prohibiting suits by foreign representatives does not apply.

18 Cyc. 1239 (*b*) I., citing
Tittman v. Thornton, 107 Mo. 500;
Wilkins v. Ellett, 108 U. S. 256.

The certified and authenticated copy of the letters of administration of Mrs. A. E. Bomar, which we offered in evidence, and which show that the will of David T. Bomar was filed for probate on October 3rd, 1917, and not on October 8th, 1917, as erroneously stated by opposing counsel, and also of her appointment on October 3rd, 1917 and not on October 8th, 1917, are attached hereto.

It is respectfully submitted therefore that the Court should recognize Mrs. Bomar as the proper party to be substituted in place of her deceased husband, and that the application for a writ of
73 scire facias against the Public Administrator, as well as the application of the Public Administrator for leave to intervene, should be denied. We are prepared to furnish, if the Court thinks the fact important, and desires to make that a condition of its order reviving the cause by substituting Mrs. Bomar, an affidavit of a person familiar with Mr. Bomar's affairs to the effect that at the time of his death he left no debts to any person in the state of Missouri.

TAYLOR & CHASNOFF,
Attorneys for Mrs. A. E. Bomar, Elencious Smith and Douglas W. Robert.

74 [Endorsed:] No. 4982. In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones, Complainant, v. Missouri-Edison Electric Company et al., Defendants. Brief on behalf of Anna E. Bomar, Elencious Smith and Douglas W. Robert on question of substitution for David T. Bomar. Taylor & Chasnoff, St. Louis.

75 EXHIBIT "M" TO RETURN.

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4982.

MORGAN JONES, Complainant,

vs.

UNION ELECTRIC LIGHT & POWER COMPANY et al., Defendants.

Reply to the Argument for Mrs. Bomar and Others.

The brief submitted in answer to ours in behalf of the Public Administrator is so interwoven with immaterial matter and so palpably founded upon a misconception of the question to be decided by this court that we feel some reply to be necessary.

Under the heading "The Public Administrator is without authority, etc.," opposing counsel argue matters which might properly have been heard in the Probate Court or on appeal from the action of the Probate Court in appointing the Public Administrator to take

charge of the Bomar estate in Missouri. They entirely overlook the proposition that a judgment of a court of competent jurisdiction, no matter how erroneous or ill founded in the circumstances, is none the less a valid judgment for all intents and purposes until it is set aside or arrested in a direct proceeding or upon appeal or writ of error. We have already cited an abundance of authority to the effect that the action of the Probate Court, such as was taken in this case, is a judgment not subject to collateral attack, and another case
76 upon that subject is Beeraft v. Lewis, 41 Mo. Ap. 546. In that case it was held that under circumstances such as are here disclosed good cause existed for ordering the Public Administrator to take charge of the estate, notwithstanding the fact that there were no debts existing in the jurisdiction. The question with which this court has to deal is not what circumstances under the law of Missouri justify a probate court in ordering its officer to take charge of an estate, but rather whether or not such a court did do so. This court can no more invade the province of the Probate Court of the City of St. Louis than the latter court could undertake to direct a receiver in bankruptcy appointed by this court. Principles of comity too well settled to admit of question foreclose such a possibility.

Counsel seem to recognize the soundness of this proposition and they attempt to avoid it by saying that the Probate Court is not one of general jurisdiction. If by that they mean not one of general common law powers we may concede the fact without coming into the zone of danger. But it is one of general jurisdiction on probate matters and not only general jurisdiction but exclusive jurisdiction, and it is the settled law of Missouri recognized and followed in the federal jurisdiction that the acts of a Probate Court under its powers are to be treated as the acts of courts of general jurisdiction in other matters.

Upon that subject the Supreme Court of Missouri has said that probate courts have general jurisdiction in the probating of wills and granting letters of administration and in the administration of estates, and that their actions even when beyond the jurisdiction, and therefore of no legal force, are entitled to the same weight as the actions of other courts of record and are not open to collateral attack.

77 Johnson v. Beazley, 65 Mo. 250;
Deloge v. Tucker, 196 Mo. 601 l. c.
State ex rel. v. Reynolds, 121 Mo. Ap. 701 l. c.

There is nothing to the contrary in Richardson v. Bush, 198 Mo. 174, because the court held that the inquiry which it there made into the right of a Public Administrator was in itself a direct and not a collateral attack. The same may be said of Bell v. Bank, 188 Mo. 383, and it is not helpful here that in the latter case it was said that it was sufficient if no debts had not appeared, because some time had elapsed in that case for the proof of debts before the question came up, while here the deceased has been dead but thirty one days.

We freely agree with opposing counsel that the question for the

court to determine is who is the proper party to be substituted for Mr. Bomar, but we take leave to remind counsel that in that inquiry the word "proper" means legal. It does not mean anything other than who can legally appear and prosecute or defend the rights of the deceased. There is nothing of advantage to be gained by counsel in claiming that a temporary ap-ointment of Mrs. Bomar was made on October 3rd, because, as we have already pointed out, that appointment is merely temporary and may be set aside when the County Court of Tarrant County comes again in session; and because, further, even if it is not set aside it has no extra territorial effect and does not endow her with the character of executrix or administratrix in Missouri. Not being so endowed she can not appear and participate in litigation in Missouri, nor in any federal court sitting in Missouri, as counsel in effect concede since they do not deny our proposition of law that a foreign executor or administrator can not litigate in a federal court in Missouri in mere virtue of an appointment by the courts of another state.

We are not concerned with any question of the right or duty
78 of this court to issue a writ of scire facias, nor with any lapse into which our opponents contend that counsel for the Messrs. Thompson and Thompson have fallen. Even if it be true that under equity rule 45 substitution of the "proper" party can be made on motion, we would remind the court that we have already made that motion to substitute the Public Administrator. We distinctly disagree with counsel, however, that "it is left to the sound discretion of this court as to who should be appointed as a proper party." That does not appear from the equity rule nor from any decision in the books. The proper party is determined by the law and a legal discretion does not mean the mere whim of the court, but it refers rather to the duty of the court when looking at the circumstances through the eyes of the law.

It is somewhat startling to us to learn from counsel's brief that this court takes judicial notice of the provisions of the Texas law. As that State is situated in a different circuit we do not understand such to be the fact. But if it does take judicial knowledge of that, then the court knows that the mere offer of the will for probate and the mere temporary appointment of Mrs. Bomar is but an interim action subject to being upset in term time, and vesting her with no more powers than those of a temporary receiver.

If there is anything in the case of Tittman v. Thornton, 107 Mo. 500 which lends aid or comfort to opposing counsel they are very welcome to it, but our conception of the case gives it quite a contrary effect. The sum and substance of that decision, as may be seen on page 506 of the official report, is nothing more or less than this: that where an administrator has recovered judgment in the State where he received his appointment he may sue on that judgment in a different State.

That, however, has nothing to do with this case, because Mrs.
Bomar has not recovered any judgment in Texas and is not
79 trying to appear in this litigation on any such theory.

In the end the whole case comes to this; that the Probate

Court of the City of St. Louis, a court having jurisdiction of such an inquiry, found and determined all the facts essential to the appointment of the Public Administrator to take charge of the assets of Mr. Bomar in Missouri, and it appears upon this record that there are such assets. By the repeated decisions of the federal courts a Texas administrator can not appear here to do the things essential to be done in the protection of the deceased's interest. It results from these considerations that the Public Administrator is the sole person qualified to appear for the estate in this litigation, and that any judgment rendered in his absence from the record will be subject to reversal on appeal.

WELLS H. BLODGETT,
GEO. B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Attorneys for Frank M. Slater, Public Administrator of the City of St. Louis, Missouri.

80 [Endorsed:] No. 4982. In the U. S. District Court for the Eastern Division, Eastern District of Missouri. Morgan Jones, Complainant, vs. Union Electric Light & Power Company et al., Defendants. Reply to the Argument for Mrs. Bomar and Others. Wells H. Blodgett, George B. Webster, Henry W. Blodgett, Walter N. Fisher, Attorneys for F. M. Slater, Public Administrator, City of St. Louis, Missouri.

81 EXHIBIT "N" TO RETURN.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In Equity. No. 4982, C. C.

MORGAN JONES et al., Complainants,

vs.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

The Court having fully considered the application of W. B. & Ford W. Thompson, filed Oct. 2nd 1917, for the issuance of a writ of scire facias herein, and the application of Frank M. Slater as Public Administrator of the City of St. Louis, Missouri, for leave to intervene, and the motion of Anna E. Bomar for revivor of this cause by substitution of herself as temporary administratrix of David T. Bomar in his place as party claimant herein, doth order that said application of W. B. & Ford W. Thompson and said application of Frank M. Slater as Public Administrator of the City of St. Louis, Missouri, be and the same are hereby denied; that the motion of said Anna E. Bomar be granted, and that she be and is hereby substituted as

a party claimant to the fund now in the registry of the Court in place of David T. Bomar, deceased, this cause being now revived accordingly.

October 29th, 1917.

DAVID P. DYER, *Judge.*

[Endorsed:] No. 4982. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones et al., against Missouri-Edison Electric Company et al. Order denying petition of Messrs. Thompson and Slater and substituting Anna E. Bomar as party claimant, etc. Filed Oct. 29th, 1917. W. W. Nall, Clerk.

82 EXHIBIT "O" TO RETURN.

No. 4982.

MORGAN JONES

vs.

MISSOURI EDISON ELECTRIC COMPANY et al.

DYER, *J.:*

A final decree for complainants was entered in this case on July 6th, 1916, and on the 17th. of July, on a stipulation an order was entered transferring the registry fund to the State National Bank.

On the 20th. of September, 1916, a motion was filed by David T. Bomar et al. for distribution of the fund. All of the money in the registry of the court has been paid out except about the sum of $100,000.00 which was by agreement set aside for attorneys' fees. A question arose as to the division of this fund between the attorneys in the case, and by consent of parties the matter was referred to Frank L. Schofield as Special Master on the 27th. day of September, 1916.

On the 13th. of July, 1917, the Master filed his report as to the division of the attorneys' fees. The attorneys engaged in this litigation and between whom this fund was to be divided were W.
83 B. & Ford W. Thompson, David T. Bomar, Elenious Smith and Douglass Robert.

On the 31st. of July, 1917, Messrs. W. B. and Ford W. Thompson filed exceptions to the report of the Master and on August 1st., Bomar, Smith and Robert also filed exceptions to the report.

At the request of the parties in interest these exceptions were set down for hearing on the 3rd. day of October, 1917. On September 22, 1917, and before the date set for the hearing, David T. Bomar died in Tarrant County, Texas. The death of Bomar was suggested to the court, and the hearing set for the 3rd. of October was in consequence thereof postponed.

On October 2nd., 1917, application for a scire facias was made by W. B. & Ford W. Thompson against the representative of Bomar, deceased. This application shows that on the 1st. day of October,

1917, the death of David T. Bomar was suggested, and that letters of administration upon the estate of said Bomar were issued to Frank M. Slater, Public Administrator of the City of St. Louis, Mo., and the prayer of this application is that such administrator be made a party to these proceedings, and that a scire facias issue forth-
84 with to said Administrator that he appear in this cause as the representative of David T. Bomar, deceased.

On the 13th. of October, 1917, Anna E. Bomar appeared by Attorney and asked to be made a party to this proceeding, by reviving the proceedings in her name, and in that application she stated that David T. Bomar died in Tarrant County, Texas, on September 22nd., 1917, that at the time of his death he was a resident of the City of Fort Worth, Texas; that he died testate; that applications to probate his will and for letters testamentary were filed in the County Court of Tarrant County, Texas, and the applications are now pending in said court; that said Anna E. Bomar was, by an order duly entered of record, appointed administratrix of the estate of said David T. Bomar, deceased, and charged with the duty to take possession and charge of all of the property of said estate, wheresoever situated, and to collect and receipt for all moneys owing to said estate, and to do any and all things that may be necessary to properly care for and protect and preserve said estate, and to do and perform all matters that may be necessary to obtain the portion of the Attorney's fees due to the estate of said Bomar, deceased, earned in the case of Morgan-Jones vs. Missouri-Edison Electric Company, including the
85 power to appear in court where such matter is pending etc. That said Anna E. Bomar has entered into a bond as required by said court, and has duly qualified as temporary administratrix of the estate of said David T. Bomar, deceased.

The application further states that David T. Bomar left all of his property, except the sum of one dollar, to Anna E. Bomar, his wife. That the reason that she is now only temporary administratrix of said estate is that under the laws of the State of Texas the matter of the probating of said will cannot be heard before the November Term 1917, of said County Court. She further says that Bomar left no property of any kind in the State of Missouri, subject to loss or waste, destruction or otherwise, or to administration under the laws of the State of Missouri.

With this application has been filed a duly certified copy of the will of Bomar, together with the order of court appointing his widow as administratrix temporarily of said estate.

The only question before the court now is whether the Public Administrator of the City of St. Louis should be made a party to this cause, or whether Mrs. Bomar the widow of David T.
86 Bomar, deceased, is the proper person to appear in this court as a party to this suit. In other words, the case must be revived, and the only question is as to whether she is the proper person to be recognized by the court.

The fund in dispute is in the State National Bank subject only to the order of this court. It was admitted upon the hearing that

Bomar had no property of any kind whatever in the State of Missouri excepting his interest in this fund held by the court.

The Public Administrator of the City of St. Louis claims that he is the proper person to be made a party to this suit. The right of the Public Administrator to take charge of this or any other estate depends upon the question as to whether the assets belonging to that estate are left in a situation "exposed to loss or damage." Quoting from a decision in 183 Mo. App., 257, "It is clear that though there may be assets of a foreign testator or intestate having a technical situs in this State, nevertheless the Public Administrator has no power to administer thereupon under the 4th. sub-division, supra, unless the same are left in a situation exposed to loss or damage."

This fund not being so "exposed to loss or damage" the
87 Public Administrator of the City of St. Louis has no right to claim the same, and the application to make him a party to this suit is denied.

The Administratrix of Bomar's estate in the State of Texas is the proper person to be made a party to this action, and the order of the court will be that the motion heretofore filed in this cause to revive the same by substituting the name of Anna E. Bomar in the place of David T. Bomar, be and is sustained.

[Endorsed:] No. 4982. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones et al., against Missouri Edison Elec. Co. et al. Opinion. Filed Oct. 29, 1917. W. W. Nall, Clerk.

88 EXHIBIT "P" TO RETURN.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

In Equity. No. 4982.

MORGAN JONES, Complainant,

v.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

Comes now Anna E. Bomar, by Taylor and Chasnoff, her attorneys, and represents to the court that David T. Bomar died in Tarrant County, Texas, on September 22, 1917; that at the time of his death the said David T. Bomar was a resident of the city of Fort Worth, Tarrant County, Texas; that said David T. Bomar died testate leaving a will which was duly filed for probate in the County Court of Tarrant County, Texas, on October 3, 1917; that, thereupon, by an order, duly entered of record on said date, she was duly appointed temporary administratrix of the estate of David T. Bomar, deceased, by said court, and authorized to appear in this court for the purpose of obtaining the portion of attorneys' fees due to the estate of David T. Bomar, deceased, earned in the above entitled cause, and to

represent said estate in said matter; that thereafter, on October 14, 1917, your petitioner filed her motion in this cause for an order reviving the cause by substituting her as a party in place of David T. Bomar, deceased, which motion was by this court sustained.

Your petitioner further states that on the 6th day of November, 1917, the said will of said David T. Bomar was duly admitted to probate in the County Court of Tarrant County, Texas, by an order duly entered of record in said court on the 6th day of Novem-
89 ber, 1917, as appears more fully by the certified and authenticated copy of the Judgment of said court, attached hereto and marked "Exhibit A"; that at the same time said County Court of Tarrant County, Texas, permitted your petitioner to withdraw her application praying for Letters Testamentary, and adjudged and decreed that there were no debts owing by the estate of David T. Bomar, deceased, and that no administration was necessary upon said estate.

Your petitioner further represents that by virtue of said decree adjudging that no administration is necessary upon said estate, the laws and statutes of the State of Texas, and the terms of said will of David T. Bomar, deceased, all the right, title and interest of David T. Bomar in and to the fund in this court, as well as all his rights or claims thereto were vested absolutely in the said Anna E. Bomar in her individual capacity as of the date of the death of said David T. Bomar, deceased.

Wherefore, your petitioner prays this court to recognize her as the absolute owner in her individual capacity of all right, title and interest of David T. Bomar in and to the said fund in this court, as well as all rights or claims thereto, which he had at the time of his death, and that your petitioner be now substituted in her individual capacity as a party in place of said David T. Bomar, deceased; and to permit her to adopt as her own the exceptions heretofore filed in behalf of said David T. Bomar to the report of the Special Master heretofore filed herein, and to permit her, as the owner of the interest in said fund which the said David T. Bomar had at the time of his death, to appear in said cause at the hearing of said exceptions, and the exceptions heretofore filed herein by the several parties to said cause and now pending herein; and for such other and further relief herein as to the court may seem meet and proper.

ANNA E. BOMAR,
By TAYLOR & CHASNOFF,
Her Attorneys.

90 STATE OF MISSOURI,
City of St. Louis, ss:

On this 16th day of November, 1917, before me, a Notary Public within and for the City of St. Louis, Missouri, appeared Jacob Chasnoff, to me personally known, who being duly sworn, on his oath states that he has read the foregoing motion; that he is familiar with the matters therein referred to, and that the statements of facts contained therein are true to the best of his knowledge and belief.

JACOB CHASNOFF.

Subscribed and sworn to before me this 16th day of November, 1917. My term expires September 8, 1918.

[Seal G. C. Willson, Notary Public, City of St. Louis, Mo.]

G. C. WILLSON,
Notary Public within and for the City of St. Louis, Missouri.

91 [Endorsed:] In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones, Complainant, v. Missouri-Edison Electric Company et al., Defendants. Taylor & Chasnoff, St. Louis.

92 *Application for Probate of Will.*

STATE OF TEXAS,
County of Tarrant:

In the County Court of Tarrant County, Texas, November Term, 1917.

To the Honorable Jesse M. Brown, Judge of said Court:

Now comes Anna E. Bomar, and shows to the Court:

1.

That David T. Bomar is dead, and died at the place of his residence near Fort Worth, in the county of Tarrant, state of Texas, on the 22nd day of September, 1917.

2.

That at the time of his death the said David T. Bomar was possessed of an estate, a large portion of which is situated in Tarrant County, Texas.

3.

That said estate consists of real and personal property of the probable value of about Two Hundred Thousand Dollars ($200,000).

4.

That at his death the said David T. Bomar left a last will and testament in writing, which was duly executed by him with the formalities and solemnities and under the circumstances required by law to make it a valid will, and that said will has not been revoked by the testator, the same being dated the 29th day of March, A. D. 1899, and witnessed on the 30th day of March, 1899; the original of which will is filed herewith.

At the time of the execution of said will the said David T. Bomar was more than twenty-one years of age, was married, and was of sound mind and disposing memory.

In said will your petitioner, Anna E. Bomar, who is the
93 wife of the said David T. Bomar, who resides near the city of Fort Worth, in Tarrant County, Texas, is named as independent executrix.

5.

Your petitioner, Anna E. Bomar, is not disqualified by law from accepting letters testamentary. Said estate owes debts, and an administration thereon by the issuance of letters testamentary to your petitioner is necessary.

6.

Wherefore, your petitioner prays for the issuance and service of citation upon this application, as required by law, and that the said will filed herewith, executed on the 29th day of March, 1899, as aforesaid, be adjudged to be the last will and testament of David T. Bomar, deceased, and that it be recorded as such in the minutes of this Court, and that letters testamentary issue to your petitioner as independent executrix of said will.

(Signed) ANNA E. BOMAR,
By FLOURNEY, SMITH & STOVER.

Filed Oct. 3rd, 1917.
(Signed) W. H. LOGAN,
County Clerk Tarrant County, Texas.

94 In the County Court of Tarrant County, Texas.

No. 5127.

In re Estate of DAVID T. BOMAR, Deceased.

Upon the hearing of the application to probate the will in the above cause, John W. Broad appeared in open court, and after being first duly sworn, testified as follows:

"I am the John W. Broad who, with Mattie E. Broad and W. W. Purinton, witnessed the execution of David T. Bomar's will which was filed for probate herein on October 3rd, 1917. The said instrument is in writing and bears date of March 29th, 1899, but was witnessed by the above named persons on March 30th, 1899.

"The said instrument so filed herein and sought to be probated as the last will and testament of David T. Bomar is the identical instrument which Mattie E. Broad and W. W. Purinton and myself subscribed as witnesses. The other two witnesses and I subscribed our names as witnesses to said instrument in the presence of the said David T. Bomar and at his request, and in the presence of each other.

I, and the other two of said witnesses, saw David T. Bomar sign said instrument and heard him declare that it was his last will and testament. All three of said witnesses are credible persons, and were above the age of fourteen years when they subscribed the same as witnesses.

"I was well acquainted with said David T. Bomar at the time of the execution of said will, and ever since until his death. He was above the age of twenty-one years, was of sound mind, and married, at the time of the execution of said will. David T. Bomar died in Tarrant County at his residence, on the 22nd day of September, 1917, leaving an estate consisting of personal and real property, a large portion of which was situated in Tarrant County, Texas.

95 "I swear that all of the foregoing statements are true."

(Signed) JOHN W. BROAD.

Reduced to writing, and sworn to and subscribed before me by John W. Broad this 6th day of November, A. D. 1917.

(Signed) JESSE M. BROWN,
Judge of the County Court of Tarrant County, Texas.

Filed November 6th, 1917. W. H. Logan, County Clerk.

96 In County Court of Tarrant County, Texas.

No. 5127.

In re Estate of DAVID T. BOMAR, Deceased.

Upon the hearing of the application to probate the will in the above cause, William P. Bomar appeared in open Court, and after being first duly sworn, testified as follows:

"I am son and only child of David T. Bomar, deceased. I am familiar with the instrument which my mother, Anna E. Bomar, seeks to have probated in this cause as the last will and testament of said David T. Bomar, deceased, which instrument was filed herein for probate on October 3rd, 1917. I have made a diligent and exhaustive search, and the said instrument is the only instrument I have been able to find of a testamentary character executed by my father. The said instrument is his last will, and has never been revoked.

"I swear that all of the foregoing statements are true."

(Signed) WILLIAM P. BOMAR.

Reduced to writing, and sworn to and subscribed before me by William P. Bomar, this 6th day of November, A. D. 1917.

(Signed) JESSE M. BROWN,
Judge of the County Court of Tarrant County, Texas.

Filed November 6th, 1917. W. H. Logan, County Clerk.

97 In County Court of Tarrant County, Texas.

No. 5127.

In re Estate of DAVID T. BOMAR, Deceased.

Upon the hearing of the application to probate the will in the above cause, E. H. Holcomb appeared in open Court, and after being first duly sworn, testified as follows:

"I am familiar with the affairs of David T. Bomar, deceased, prior to, at the time of, and since his death. I was his bookkeeper, and am the bookkeeper for his estate. I know of no debts against his estate. There are none.

"I swear that all of the foregoing statements are true."

(Signed) E. H. HOLCOMB.

Reduced to writing, and sworn to and subscribed before me by E. H. Holcomb, this 6th day of November, A. D. 1917.

(Signed) JESSE M. BROWN.
Judge of the County Court of Tarrant County, Texas.

Filed November 6th, 1917. W. H. Logan, County Clerk.

98 *Probate of Will.*

In re Estate of DAVID T. BOMAR, Deceased.

November 6th, A. D. 1917.

On this day came on for hearing the application of Anna E. Bomar for the probate of a certain instrument in writing, of date March 29th, A. D. 1899, now produced in court and purporting to be the last will and testament of David T. Bomar, deceased, filed herein on October 3rd, 1917;

And it appearing to the Court that due and legal notice of the filing of said instrument and the application to probate the same has been given in the manner and for the time required by law, and the evidence, a copy of which is on file in this Court, having been heard and fully considered, the Court finds as follows:

First. That the said instrument so offered for probate was executed by the said David T. Bomar, deceased, and is his last will and testament, and that at the time of his execution thereof he was over twenty-one years of age, was married and was of sound mind, and that he is dead.

Second. That said David T. Bomar died at his residence in Tarrant County, Texas, on September 22nd, 1917, in which county he left property, both real and personal, and the Court finds that it has jurisdiction of his estate.

Third. That said David T. Bomar executed said will with the

formalities and solemnities and under the circumstances required by law to make it a valid will.

Fourth. That said will has not been revoked by the testator.

99 It is, therefore, ordered, adjudged and decreed by the Court that the said instrument in writing be, and the same is hereby adjudged to be the last will and testament of David T. Bomar, deceased, and the same is hereby admitted to probate as the last will and testament of the said David T. Bomar, deceased, and the said will and the testimony herein, together with all the other papers in this case, shall be recorded in the minutes of this Court.

It is further ordered by the Court that E. E. Bewley, E. H. Holcomb and William P. Bomar be, and they are hereby appointed appraisers to appraise the estate, both real and personal, of David T. Bomar, deceased.

And it appearing to the Court that there are no debts owing by the estate of David T. Bomar, deceased, the Court finds that no administration is necessary upon said estate; and Anna E. Bomar having asked the Court for permission to withdraw so much of her application as prayed for letters testamentary, such request is hereby granted and her said prayer for letters testamentary is hereby stricken out, but without prejudice to her right to again apply for letters testamentary in the event it should hereafter appear to be necessary.

(Signed) JESSE M. BROWN.
Judge County Court, Tarrant County, Texas.

Filed Nov. 6th, 1917.
(Signed) W. H. LOGAN,
County Clerk Tarrant County, Texas.

100 *Will of David T. Bomar.*

THE STATE OF TEXAS,
County of Tarrant:

Know all men by these presents: That I, David T. Bomar, of the County of Tarrant and State of Texas, being of sound mind and memory and desiring to dispose of my worldly affairs while I have the health and strength so to do, I do make and publish this, my last will and testament and make the following bequests:

1st. I bequeath to my beloved son, William P. Bomar, the sum of One Dollar ($1.00).

2nd. I bequeath to my beloved wife, Anna E. Bomar all property, both real and personal, choses *and* action, etc. of which I may die possessed. My purpose, however, in so doing is not in any way to be construed as an intention on my part to leave my beloved son without any part of my estate except the bequest given him by paragraph I hereof, but my said son, being the object around which the mutual affections of my said beloved wife and myself cling and feeling and possessing entire confidence in my beloved wife, it is my will and desire that she take my said estate to be used by her as she sees

proper, believing that she will in all things properly provide for our said beloved son.

I appoint my beloved wife, Anna E. Bomar, sole executrix of this will without bond.

101 This is intended as an independent will under the laws of the State of Texas and I direct that there shall be no proceedings whatever hereunder except the probating of this will and filing of an inventory and appraisement thereunder.

Given under my hand, this the 29th day of March A. D. 1899 and I sign my name in the presence of John W. Broad, Mattie E. Broad and W. W. Purinton and request them to sign same as witnesses.

DAVID T. BOMAR.

We, the undersigned, have this day signed the last will of David T. Bomar in his presence and in the presence of each other at the special request of the said David T. Bomar on this the 30th day of March A. D. 1899.

MATTIE E. BROAD.
JOHN W. BROAD.
W. W. PURINTON.

Filed Oct. 3, 1917. W. H. Logan, County Clerk.

102 THE STATE OF TEXAS,
County of Tarrant:

I, W. H. Logan, Clerk of the County Court of Tarrant County, Texas, hereby certify that the annexed and foregoing writing is a true and perfect copy of the application for probate of the will of David T. Bomar, deceased, of the proof of attesting witnesses and the judgment of probate in the matter of the probate of the will of David T. Bomar, deceased, and of the will so probated as the same appear of record on file in my office.

Witness my hand and the seal of the County Court of Tarrant County at Fort Worth, Texas, the 6th day of November, 1917.

[Seal County Court, Tarrant County, Texas.]

W. H. LOGAN, *Clerk.*

THE STATE OF TEXAS,
County of Tarrant:

I, Jesse M. Brown, presiding Judge of the County Court of Tarrant County, Texas, do hereby certify that W. H. Logan, whose genuine signature is affixed to the above and foregoing certificate, was on the date of signing said certificate, a clerk of said court aforesaid, and that his official acts as such clerk are entitled to full faith and credit, and that said foregoing attestation is in due form of law.

Given under my hand and seal of my said Court, this 6th day of November, 1917.

[SEAL.] JESSE M. BROWN,
Presiding Judge of the County Court of Tarrant County, Texas.

Attest:

[Seal County Court, Tarrant County, Texas.]

W. H. LOGAN,
Clerk of said Court.

102½ THE STATE OF TEXAS,
County of Tarrant, ss:

I, W. H. Logan, Clerk of the County Court of Tarrant County, Texas, (the same being a court of record in and for said County and State) certify that Jesse M. Brown is Presiding Judge of the County Court of Tarrant County, Texas, duly commissioned and qualified.

In testimony whereof I hereto set my hand and affix the seal of said court at office in the City of Fort Worth, Tarrant County, Texas, this 6th day of November, A. D. 1917.

[Seal County Court, Tarrant County, Texas.]

W. H. LOGAN, *Clerk.*

103 [Endorsed:] No. 4982. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones et al. against Missouri-Edison Electric Co. et al. Motion of Anna E. Bomar to be substituted in her own right as party claimant. Filed Nov. 16, 1917. W. W. Nall, Clerk.

104 EXHIBIT "Q" TO RETURN.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In Equity. No. 4982, C. C.

MORGAN JONES et al., Complainants,

vs.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

The Court having fully considered the motion of Anna E. Bomar, filed herein November 16th, 1917, praying that she be recognized and substituted in her individual right as owner of all right, title and interest of David T. Bomar in and to the fund now in the registry

of this Court; and upon consideration of the proofs now adduced in open Court in support of said motion; the Court doth order that said motion be granted, and that the said Anna E. Bomar be and she is hereby recognized as claimant in this cause in place and stead of the said David T. Bomar, deceased, such recognition *to* Anna E. Bomar not being in any representative capacity but in her individual right as the present owner of all right, title and interest of said David T. Bomar in and to the fund now in the registry of the Court.

November 19th, 1917.

DAVID P. DYER, *Judge*.

[Endorsed:] No. 4982. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones et al., against Missouri-Edison Electric Company et al. Order making Anna E. Bomar claimant, etc. Filed Nov. 19, 1917. W. W. Nall, clerk.

105 EXHIBIT "R" TO RETURN.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In Equity. No. 4982 C. C.

MORGAN JONES et al., Complainants,

vs.

MISSOURI-EDISON ELECTRIC COMPANY et al., Defendants.

Now at this day comes Anna E. Bomar, claimant herein, and in open Court adopts all the pleadings, including the pending exceptions to the Master's report, heretofore filed by or on behalf of David T. Bomar in this cause; and all the parties claimant hereto being represented by their respective solicitors, the Court doth order that the hearing of all exceptions to the report of the Special Master in this cause be and the same is hereby set down for Friday, November 30th, 1917.

November 19th, 1917.

DAVID P. DYER, *Judge*.

106 [Endorsed:] No. 4982. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. Morgan Jones et al. against Missouri-Edison Electric Company et al. Order setting hearing of exceptions to master's report for Nov. 30th, 1917. Filed Nov. 19, 1917. W. W. Nall, clerk.

107 EXHIBIT "S" TO RETURN.

STATE OF MISSOURI,
City of St. Louis, ss:

In the Probate Court Within and for the City of St. Louis, State of Missouri, in Vacation, After the September Term, 1917.

Estate of DAVID T. BOMAR.

Revocation and Order to Administer.

Wednesday, November 7, 1917.

It appearing to the undersigned Judge of the Probate Court in and for the City of St. Louis, in vacation, that a copy of the last will and testament of David T. Bomar, late of the State of Texas, deceased, duly authenticated according to law, has been produced in and recorded in the office of the Clerk of said Court, wherefore it is ordered by the undersigned Judge of said Court, that the authority of Frank M. Slater, Public Administrator of the City of St. Louis, and as such in charge of the estate of said deceased, under the order of said Court, of date October 7, 1917,—to administer said estate, be and the same is hereby revoked, set aside and vacated, and that he make settlement of his accounts as such Administrator of said estate with his successor, as required by law. And it further appearing that said deceased left an estate in the City of St. Louis, Missouri, which is liable to be diminished or otherwise impaired, wasted or injured unless there be some person authorized to administer the same; that said deceased left no widow, devisee, legatee or other person in the State of Missouri, capable of administering said estate; and it further appearing that it is necessary and desirable that administration be had on the said estate in this State, and that Frank M. Slater, Public Administrator of the said City of St. Louis, has, on this day, in his official capacity, filed in the office of the Clerk of said Court a notice that he has taken charge of the estate of said David T. Bomar, deceased, in this State, with the last will of said deceased annexed, it is therefore ordered by the undersigned Judge of said Court, that said Frank M. Slater, Public Administrator as aforesaid, be and he is hereby directed to take into his charge and custody, as such public administrator under his official bond as such, the estate of said deceased remaining unadministered, and administer the same according to law and the last will of said deceased.

CHAS. W. HOLTCAMP,
Judge of Probate.

108 STATE OF MISSOURI,
City of St. Louis, ss:

I, George Brand, Clerk of the Probate Court within and for the City of St. Louis aforesaid, do hereby certify the foregoing to be a

true copy of the order of Court entitled "Revocation and Order to Administer" in the matter of the estate of David T. Bomar, deceased, as fully as the same appears of record in my office.

In witness whereof, I hereunto set my hand and affix the seal of said Court, at office, in St. Louis, this 30th day of November, 1917.

[Seal Probate Court of the City of St. Louis, Missouri.]

GEORGE BRAND, *Clerk.*

109 [Endorsed:] No. 48472. St. Louis Probate Court. In the matter of David T. Bomar, deceased. Certified copy of Revocation and Order to Administer.

110 [Endorsed:] Supreme Court U. S., October term, 1917. Term No. 27, Origl. Ex parte: In the matter of Frank M. Slater, Public Administrator, &c., Petitioner. Return of Respondent. Filed December 6, 1917.

Office Supreme Court, U. S.
JAN 19 1918
JAMES D. MAHER,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 27 Original.

Ex parte FRANK M. SLATER,
Public Administrator of the City of St. Louis, Missouri,
Petitioner.

BRIEF FOR THE PETITIONER.

WELLS H. BLODGETT,
GEORGE B. WEBSTER,
HENRY W. BLODGETT,
WALTER N. FISHER,
Counsel for Petitioner.

St. Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1819.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 27 Original.

Ex parte FRANK M. SLATER,
Public Administrator of the City of St. Louis, Missouri,
Petitioner.

BRIEF FOR THE PETITIONER.

STATEMENT OF THE CASE.

The facts out of which this proceeding arose are substantially as follows: In April, 1904, there was begun in the United States Circuit Court for the Eastern District of Missouri a proceeding in equity by Morgan Jones against the Missouri-Edison Electric Company, the Union Electric Light & Power Company and others, the object of which was to set aside

a consolidation of the two companies mentioned and to recover from the defendants, by means of an accounting, the difference between the actual value of the complainant's stock and the price which he received for it in the consolidation. Such proceedings were had in the case that a final decree resulted in favor of the complainant and certain persons similarly situated, who had intervened. By the terms of this decree, $95,770.00, in addition to certain sums already paid, were found to be due the several solicitors of record who had represented the complainant and the intervenors, and by agreement of all parties this sum was on July 17th, 1916, deposited in the State National Bank of St. Louis, Missouri, a banking institution doing business in the City of St. Louis, Missouri, to be there held pending the settlement of a dispute between the said solicitors as to the division between them to be made of that fund. These solicitors being unable to agree on the proper division of the fund, the matter was referred to a Master, who, on July 13th, 1917, filed his report, to which exceptions were filed by William B. and Ford W. Thompson, and also by David T. Bomar, Eleneious Smith and Douglas W. Robert. The exceptions of the Thompsons challenged the correctness of the amount allowed to the other solicitors jointly, and the exceptions of the latter charged that too much had been allowed to the Thompsons. While the matter was

thus pending undetermined, and on September 22nd, 1917, Bomar, who was then and for a long time had been a citizen of the State of Texas, domiciled in the City of Fort Worth, suddenly died, and on the 27th day of September, 1917, Frank M. Slater, who was then and is still the duly qualified and acting Public Administrator of the City of St. Louis, Missouri, having been advised of the death of Bomar and the fact that he had an interest in the fund on deposit in the State National Bank in St. Louis, Missouri, and that the amount of his interest was drawn into issue by the pending exceptions, proceeded in accordance with Section 302 of the Revised Statutes of Missouri of 1909, then and now in force and effect, to take charge of the estate of Bomar in Missouri in his official capacity and under his official bond. On October 5th, 1917, the Probate Court of the City of St. Louis, Missouri, to which by the law of the State of Missouri is committed exclusive jurisdiction over the appointment of executors and administrators, and the management and administration of the estates of deceased persons, confirmed his action in so doing, and entered of record an order and judgment in words and figures as follows, to wit:

> "It appearing to the Court that David T. Bomar, deceased, late a resident and citizen of the State of Texas, died on the 22nd day of September, 1917, leaving an estate in the City of St.

Louis, Missouri, consisting of an interest in a sum of money now on deposit in the State National Bank of the said City of St. Louis, and that the extent of the interest of the said deceased is dependent upon the result of certain litigation now pending, and that by reason thereof the same is liable to be diminished or otherwise impaired, wasted or injured unless there be some person duly authorized to appear for and represent the interest of the said deceased in the said litigation; that said deceased left no widow, devisee, legatee or other person in the State of Missouri capable of administering; And it further appearing to the Court that it is necessary and desirable that administration be had on the said estate in Missouri, and that Frank M. Slater, Public Administrator of the said City of St. Louis, has in his official capacity filed in the office of the Clerk of this Court a notice that he has taken charge of the estate of the said David T. Bomar, deceased, in Missouri, it is ordered and decreed that the said Frank M. Slater, Public Administrator as aforesaid, be and he is hereby directed to take charge and possession and administer upon the estate of the said deceased in the City of St. Louis, Missouri."

On learning of the death of Bomar, counsel for William B. and Ford W. Thompson suggested his death in open court on October 1st, 1917, and on the following day prayed that a writ of *scire facias* might issue against Slater, the Public Administrator, requir-

ing him to show cause why the proceedings should not be revived in his name as administrator of Bomar. On October 8th, 1917, the will of Bomar was exhibited to the County Court of Tarrant County, Texas, and was there filed, but by Sections 3256 to 3261 of the Revised Civil Statutes of Texas of 1911 the will could not be probated until after the return of a citation issued to the next term of court, which did not begin until some time in the following month. According to the Texas practice, a temporary administrator was appointed, and the widow of Bomar, who was named in the will as executrix, was given this appointment. On October 13th following, she filed in the District Court of the Eastern District of Missouri, in the Morgan Jones case, a motion to revive the cause by substituting her as a party in the place of her deceased husband, and for leave to enter appearance and participate in the litigation as his personal representative. On October 16th, 1917, Slater, the Public Administrator, by counsel, appeared in open court and presented an intervening petition setting up all of the foregoing facts and praying that he be substituted as a party in place of Bomar, deceased. The Court refused orally to allow the intervening petition of Slater to be filed and refused to grant him leave to appear in the litigation. Subsequently, on October 29th, 1917, the Court formally entered of record an order denying the application of Slater and

admitting into the litigation as a party Mrs. Anna E. Bomar, who was named in the will under the law of Texas as executrix, and had been appointed temporary administratrix. Thereupon Slater, believing himself to be aggrieved by this action of the Court and having no recourse by appeal or writ of error, presented his application here for leave to file a petition for a writ of *mandamus*, which was subsequently granted, and a rule issued against the Judge of the District Court of the Eastern District of Missouri, as respondent, to show cause why such a writ as was prayed should not issue. On December 6th, 1917, the return of the respondent was filed, and the petitioner now moves for the issuance of a peremptory writ of *mandamus* notwithstanding the return.

BRIEF OF THE ARGUMENT.

I.

The Return of the Respondent Sets Forth no Facts Sufficient to Constitute Cause Why the Peremptory Writ of Mandamus Should Not Issue.

(a) The reappointment of the petitioner as administrator *cum testamento annexo* does not change the matter in issue before the respondent nor abridge the right of the petitioner to administer the Bomar estate.

1 Woerner Am. Law of Adm. (2nd Ed.) Sec. 245.

The resulting change in the official characterization of the petitioner does not cause any change except in distribution which can only occur after administration is complete, and that does not necessitate the abatement of the writ.

Thompson v. U. S., 103 U. S. 484, *l. c.*

(b) The proposition that there was no necessity for administration on the Bomar estate in Missouri is no ground against the writ, because that question is foreclosed by the judgment of the Probate Court

of the City of St. Louis, Missouri, which is immune from such collateral attack.

Johnson v. Beasley, 65 Mo. 250;
Desloge v. Tucker, 196 Mo. 601, *l. c.*;
Garrett v. Boeing, 68 Fed. 57, *l. c.*;
Am. Car & Fdy. Co. v. Anderson, 211 Fed. 301;
Smith v. Jennings, 238 Fed. 54;
Simmons v. Saul, 138 U. S. 451, *l. c.*;
Christianson v. King Co., 239 U. S. 372;

and because the case falls within the ninth clause of the Missouri statute,

R. S. Mo. 1909, Sec. 302;

and because there was indebtedness of the estate provable in Missouri,

Mo. Session Acts, 1917, p. 115.

(c) The act of the Texas court having probate jurisdiction did not clothe Mrs. Bomar with the character of administratrix or executrix in Missouri nor with authority to appear and participate in litigation in Missouri. Her Texas appointment had no extra territorial force.

1 Woerner, Am. Law Adm. (2nd Ed.) Sec. 160;
McPike v. McPike, 111 Mo. 216;
Crohn v. Clay County Bank, 137 Mo. App. 712,

and that is true as to litigation in the Federal Courts.

Johnson v. Powers, 139 U. S. 156;
Eels v. Holder, 12 Fed. 668;
Mills v. Knapp, 39 Fed. 592;
Black v. Allen Co., 42 Fed. 618;
Allen v. Fairbanks, 36 Fed. 402;
Moore v. Petty, 135 Fed. 668;
Courtney v. Pradt, 135 Fed. 818;
Graham v. Lybrand, 142 Fed. 109;
Beaumont v. Beaumont, 144 Fed. 288;
Watkins v. Eaton, 182 Fed. 384;
Dodge v. N. Hudson, 188 Fed. 489;
Mattison v. B. & M. R. R., 205 Fed. 821.

II.

The peremptory writ of *mandamus* should issue as prayed because:

(a) The petitioner has no remedy by appeal.

In re Connaway, 178 U. S. 421;
Guion v. Liverpool Ins. Co., 109 U. S. 173;
Ex parte Cutting, 94 U. S. 14;
Ex parte Russell, 13 Wall. 664;
Life and Fire Ins. Co. v. Wilson, 8 Pet. 291.

The order denying his application for leave to intervene is not such a recognition of his status as a party to enable him to appeal.

Ex parte Cutting, 94 U. S. 14.

(b) The interest of Bomar in the undistributed fund

on deposit in St. Louis constituted assets subject to administration in Missouri.

U. S. v. Tyndale, 116 Fed. 820.

(c) The mere fact that in denying the petitioner's application for leave to file an intervening petition the respondent was acting judicially does not defeat a resort to *mandamus.*

In re Connaway, 178 U. S. 421;
Ex parte Breedlove, 118 Ala. 172;
Reynolds v. Clark, 95 Ala. 570;
Wood v. Lewanee, Cir. J., 84 Mich. 521;
Merrill, Mandamus, Sec. 186.

Where a person desires to intervene to lay claim to a fund in court and shows a *prima facie* right the refusal to admit him as a party is an abuse of discretion which may be corrected by *mandamus.*

ARGUMENT.

The return of the respondent in this case is in effect a plea of confession and avoidance, which confesses but does not avoid. It neither questions nor expressly denies any allegation of the petition for the writ; on the contrary it restates with more elaborate detail the facts pleaded by the petitioner, sets up some immaterial events occurring after the application was filed and presented here, and avers that all the orders and judgments of the respondent were duly made and entered in the exercise of his official jurisdiction and discretion and because in his opinion the same were just and proper in the circumstances of the case. In short the only question seriously presented on the face of the return is whether or not the order of October 29th, 1917, attached to the return as "Exhibit X" and set out at page 46 of the printed copy, denying the petitioner's application to intervene and become a party to the record of the case in the District Court, is such a recognition of the petitioner as a party that he may obtain a review of that adverse ruling by appeal. We do not believe that it is, for the reasons presently to be stated.

The fact that the action and judgment of the respondent here challenged and submitted for review

were taken and rendered in his judicial capacity and because he believed them to be just and proper, is, we submit, wholly immaterial. It is in his judicial capacity that he is here and it is his judicial act which is drawn into question, and of that act it is the legality, but not the good faith, which is challenged. Indeed, the integrity and good faith of the respondent's judgment is no more in question here than it is in the case of every appeal or upon any writ of error, and nothing in the petition for the writ warrants any different conclusion. With this statement we dismiss the subject from consideration.

In asserting that the only substantial question raised by the return of the respondent is whether the entry of record of the denial of the petitioner's application for leave to intervene and become a party makes the latter so much a party litigant in the case below as to entitle him to appeal and thus affords him means of relief without resort to extraordinary remedy, we have not overlooked the smaller possible questions injected into the return, and perhaps convenience as well as orderly procedure require disposal of them in the beginning. The first of these is the allegation that after the appointment of the petitioner by the Probate Court as Administrator of the Bonar estate a will was produced and filed, whereupon the character of his relation to the estate was under the law of Missouri changed from administrator

to administrator with the will annexed, and the apparent thought of the respondent's counsel that because of this distinction without a substantial difference the writ must fail. We are unable to persuade ourselves that such a result must or should follow, for these reasons; first, the matter in issue before the respondent in the case in the District Court was the right to administer upon the Bomar estate, rather than the particular kind of administration which should occur, a matter wholly for the determination of the Probate Court, and it was that right which the respondent erroneously, as we think, denied and which we here seek to protect; second, the result of the production of the will and the reappointment of the petitioner under the will did not alter his relationship to the estate nor in any manner abridge his right to administer it, but operated merely to change the manner in which he should distribute it, when administration should be complete, from that provided by the Missouri statute of descents and distribution to that specified in the will. Neither his right nor his duty to take custody of the assets of the estate, to collect and preserve the same, to settle and pay any claims against the estate, or to represent it in pending litigation, were in any manner thereby diminished or restricted; on the contrary the only resulting changes were the addition of four words to his title and the substitution in distribution of legatees

for heirs; third, where the substance of the matter in issue is the right of the person lawfully appointed administrator by the Probate Court in the exercise of its exclusive jurisdiction, to appear in an action as the representative of the estate, the writ of *mandamus* does not fail of its purpose nor the Court which issues it become impotent merely because some change is made in the name but not the identity of the person so designated. Paraphrazing the language of this Court in Thompson v. United States, 103 U. S. 484, *l. c.*, where the proceeding is in substance, as it is here, a proceeding in behalf of the estate through its duly appointed representative, there is no sense or reason in allowing it to abate by change of the name by which that representative is designated; and the more is this true where the identity of the party at whose instance the writ issues is unchanged.

The next of these matters which, in our opinion, are of minor nature and uncontrolling in the present case, is the contention set forth in the respondent's opinion denying the petition for leave to intervene, designated as "Exhibit O" to the return and set out on page 47 of the printed copy, that the Public Administrator had no authority to take charge of and administer upon the Bomar estate because the fund on deposit "was not exposed to loss or damage", for which reason he should not be permitted to appear in the litigation in the District Court. The unsound

ress of that proposition and the conclusion deduced from it is readily apparent. In the first place it amounts to a collateral attack upon the judgment of the Probate Court shown on page 6 of the petition for this writ and on page 28 of the printed return, which judgment is binding upon the respondent and the court over which he presides. Again, it ignores and overlooks the ninth clause of Section 302 of the Revised Statutes of Missouri of 1909, set forth on page 4 of the petition, to the effect that the authority of the Public Administrator shall extend to those estates of which the Probate Court shall for any cause order him to take charge, and the fact that the judgment of the Probate Court (Exhibit "A", page 28 of the printed return) did specifically order the petitioner to take charge of the Bomar estate to prevent its being injured, wasted, purloined or lost. By the law of Missouri this judgment and determination of the Probate Court was immune from collateral attack or question and beyond the scope of the respondent's power to criticise or inquire into, and by familiar principles the same immunity attends upon that judgment in the federal courts. This assertion as to the character of probate court judgments in Missouri is fully justified by the authorities cited in the brief of this argument, extended review of which is not now necessary. It is sufficient to say that such judgments are thereby given all the characteristics

of judgments of courts of general and unlimited jurisdiction, and in some of the cases, notably Johnson v. Beasley, 65 Mo. 250, it has been held that the immunity of probate judgments from collateral attack extends to every action upon the subjects confided to those courts by the constitution and laws of the state, however erroneous the act may be; and from that doctrine the courts of Missouri have never varied. The opinion in Richardson v. Bush, 198 Mo. 174, is not to the contrary because the attack there made was one of a direct nature.

The conclusive effect in the federal courts of a judgment of a state court of probate jurisdiction appointing an administrator may be seen from an examination of Simmons v. Saul, 138 U. S. 451, *l. c.*, a case many times cited and followed in the lower federal court. It was there unequivocally ruled that the appointment of an administrator by a state court of competent jurisdiction can not be attacked or questioned collaterally in the national courts even where that appointment was palpably erroneous. The case there presented drew into question collaterally the appointment of an administrator for the estate of one Simmons by a court of the State of Louisiana having probate jurisdiction, and the complainants sought to set aside a sale of lands by the administrator on the ground that he was appointed in violation of a state law under which the appointment of the public ad-

ministrator was made mandatory in the circumstances, and therefore he was not really administrator and not empowered to make a sale in that capacity. This court, speaking through Mr. Justice Lamar, and all concurring, held that whether or not the person appointed should have been the public administrator, and whether or not the appointment made was proper were matters for the consideration of the state court alone, and its judgment and action thereon could not be questioned in the federal court, the same being binding in the latter jurisdiction.

In Garrett v. Boeing, 68 Fed. 57-58, *l. c.*, following Simmons v. Saul, the Circuit Court of Appeals in the Sixth Circuit pointed out the confusion and uncertainty which would follow from any other rule, and concluded that "we are bound to give the proceedings in the parish court the same credit they would have in the state from which the record comes." So, too, the Circuit Court of Appeals in the Eighth Circuit in American Car & Foundry Co. v. Anderson, 211 Fed. 301, held itself bound by the action of a Missouri probate court in appointing the public administrator to take charge of an estate and refused to inquire into the propriety or legality of it in a collateral proceeding.

To these might be added many other authorities to the same effect, but that seems unnecessary since

they all proceed upon the same reasoning as those just cited.

The next proposition to be disposed of is that which will doubtless rest upon the assertion contained in the return that there are no debts owed by the estate of Bomar and that therefore there was no need for an administration in Missouri, but that contention is unfounded in fact and unsound as a reason why the writ should not issue; the former because under the provisions of the Missouri inheritance tax law of 1917, in force before the date of Bomar's death, the State of Missouri has a provable claim against the estate to the amount of several hundred dollars, as may be seen from Missouri Session Acts, 1917, page 115, and Section 190 of the Revised Statutes of Missouri of 1909. The *situs* of that claim is Missouri and it is a debt owed by the estate of Bomar in Missouri. But whether it is or not is beside the question here, since the judgment of the Probate Court of the City of St. Louis was to the effect that administration in Missouri was necessary and that, as already shown, is conclusive here.

The remaining matter of immateriality interwoven into the return is the proposition that because the County Court of Tarrant County, Texas, authorized Mrs. Bomar to appear in the District Court for the Eastern District of Missouri and represent the Bomar estate in Missouri in that court in the pending liti-

gation, she was thereby vested with a power which the laws of Missouri deny her and transformed into a *quasi* executrix in Missouri, and for that reason the respondent could recognize her and deprive the petitioner of the rights, and prevent the performance by him of the duties, vested in and placed upon him by the laws of Missouri. The proposition carries on its face its own refutation. It is well settled in the law of Missouri that an executor or administrator appointed in another state has no official character in Missouri and can not sue in his representative capacity in its courts, as is shown in the cases cited in the brief of this argument, and it is equally beyond doubt that the rule of exclusion of foreign executors and administrators is followed in the national courts. The cited cases expose the fundamental unsoundness of the proposition.

Coming now to the only substantial question raised by the return, we assert that the only matter properly of record in the litigation in the District Court is the order, referred to as "Exhibit X" at page 46 of the printed return, which simply denies the application of this petitioner to intervene. The opinion of the respondent, "Exhibit O", is not a part of the record proper. Is that order a sufficient recognition of the petitioner to entitle him to appeal within the rule that no one other than a party to the record can take an appeal? That rule is so well settled and is of

such general application that any doubt should be resolved in his favor, and in the circumstances it would seem that any determination of this case that would deny him the peremptory writ of *mandamus* ought to be accompanied with an express declaration of his right to appeal in the ordinary course of procedure. The cases cited in the foregoing brief of the argument amply support the general assertion that one who is not a party to the record in the lower court can not maintain an appeal, and the predicament in which this petitioner is placed by the ruling of the respondent is well illustrated by the Connaway case, 178 U. S. 421, and the Cutting case, 94 U. S. 14. The latter case seems to be conclusive not only upon the particular question with which we are now dealing, but generally upon the proposition that the mere appearance in court of a party does not make him a party to the record, and it emphasizes the distinction which we are endeavoring to make to the effect that the cases in which persons have been treated as parties, after having filed a petition for leave to come in, when no formal order admitting them appears in the record, have all been cases in which despite that informality the Court treated or recognized them as parties in subsequent proceedings in the case. After reviewing a number of such cases it is said:

> "From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested he must not only petition the Court to that effect, but his petition must be granted; and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party."

So, on the authority of this and cognate cases, we say that the mere entry by the respondent of an order denying the petitioner leave to appear as the representative of Bomar is not sufficient to make him a party within the rule governing the right of appeal. Moreover, the Cutting case is an influential authority here because it expressly holds that an appeal does not lie from an order of the lower court denying a motion for leave to intervene and become a party. The case has been frequently cited with approval in subsequent opinions of this Court and has been followed as a guidance by the lower federal courts.

This disposes of what we conceive to be the only substantial question raised on the face of the respondent's return and brings us to the consideration of the grounds upon which the petitioner claims the right to the peremptory writ of *mandamus*.

Doubtless it will be contended by opposing counsel that the fund on deposit in the State National Bank of St. Louis in which the deceased had a vested in-

terest, does not constitute property subject to administration under the state law, for the reason that it is, figuratively speaking, in the registry of a federal court and subject only to the control and disposition of that court. It seems to us, however, that there is little of merit in such a contention. While it may be true that the division of the fund and the manner of its payment is within the discretion of the District Court, still the property rights of Bomar in his just proportion of that fund are unquestionably assets located in the State of Missouri, and therefore by the law of that state subject to administration under its direction. While the question thus presented is to some extent novel, it is by no means one on which there is no authority. A like contention was unsuccessfully made as to a fund similarly situated in the case of United States v. Tyndale, 116 Fed. 820, where it was decided that the unclaimed assets of a decedent in the custody of the United States District Court are subject to administration by an administrator appointed by the Court having probate jurisdiction in the state in which the District Court was sitting. That case involved conflicting claims between the United States on the one hand and a public administrator appointed by the Probate Court of Suffolk County, Massachusetts, to the remaining balance of certain personal property found on the body of a deceased person floating in the

high seas out of the territorial jurisdiction of the United States or of any particular state. The property was brought into port by the salvors and libeled by them for salvage, and the amount in dispute was the balance remaining in the registry of the District Court after the claims of the salvors had been satisfied. By leave of Court both claimants intervened and the District Court ordered the fund paid to the Public Administrator, whereat the United States appealed. It was urged by the appellant, among other things, that a fund in the registry of a Federal Court is not subject to administration under state laws. In ruling to the contrary the Court said:

> "So far as the other proposition is concerned we think it is fully met by the broad rule that a fund which is in the registry of a federal court, sitting ordinarily or always in any particular county in the District and State of Massachusetts, is a fund in each and every county, and may properly be administered on in any county unless there is some restriction in a particular case growing out of some special matter, as, for instance, the residence of the deceased or the priority of application to some other particular probate court."

On the same page, the Court, referring to the contention that the United States alone could determine the disposition of the fund, said:

> "This is palpably so (unsound) because if otherwise it would bring us face to face with a like proposition that the existence of a fund in the registry of a federal court in the District and State of Massachusetts could under no circumstances give jurisdiction for administration, whether to a resident of the state or to a foreigner."

This seems to sustain the first proposition which the petitioner advances, and its effect is not minimized by cases doubtless to be quoted by opposing counsel where the fund in question was represented by a draft of a sub-treasury on the United States Treasurer at Washington. Such cases are of an entirely different nature because they concern a debt, or what is the same thing the evidence of a debt, due from the United States. The proposition that Bomar's interest in the fund in question is a debt due from the United States because the fund is in the registry of a Federal Court is quite unsound, as may be seen by mere reflection upon what would happen to Bomar, or his representative, if either should assert a claim against the United States for the recovery of his interest.

From this authority it follows, we believe, that the interest of Bomar in the fund in question was an asset of his estate subject to administration in Missouri, and we are certain that the order of the Probate Court, directing the petitioner to administer on the estate, was a judicial determination of the exist-

ence of assets within the State of Missouri, as well as of the facts under which the Public Administrator was entitled by the state law to take charge of that estate. With the effect of such a judgment we have already dealt and no necessity requires a further consideration of that question.

The respondent, in his return, sets up that all the orders and decrees in the premises made and entered by him were done in the exercise of his jurisdiction and official discretion, but does not in terms aver that they were so far acts of judicial discretion as to be beyond the reach of a writ of *mandamus*. We think, however, that there was no judicial discretion involved since the right of the petitioner and the duty of the respondent were plain and certain, and that the act which the respondent was called upon to do was not one in which he had any discretion, but was rather one of a ministerial nature, leaving the exercise of discretion to follow when the intervening petition had been filed and the issues raised upon it, submitted for his judicial determination. We furthermore contend that where a fund is in court and a party not already upon the record desires to advance his claim to a portion of it and have it adjudicated, he has a certain right to come in, and that the refusal to admit him as a party in such a case is an error, subject to correction by the writ of *mandamus*. It was so held in Wood v. Lewanee, Circuit Judge, 84

Mich. 521, and in effect at least by this Court in the Connaway case, 178 U. S. 421. The point which the respondent aims at in this portion of his return would perhaps be good if this writ were sought for the purpose of compelling him to decide the matters in issue between the Bomar estate and the other exceptors in the District Court in a particular manner, but, as is obvious, that is not the purpose of the present application. We seek merely to compel the admission of the petitioner into the litigation so that the judicial power may be brought to bear upon the issues which he will raise when he becomes a party to the record. Despite the general rule that judicial discretion will not be controlled by *mandamus* it is held that the admission of parties to a pending litigation is a plain duty and not a matter of discretion, where, upon the face of the application for admission, a *prima facie* right to litigate appears.

In conclusion we believe that an abundance of reason and authority supports the application of this petitioner for the writ of *mandamus*, and that by no other means can he correct what seems a prejudicial error against him on the part of the respondent.

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Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 27, Original.

Ex Parte: In the Matter of Frank M. Slater, Public Administrator, Etc., Petitioner.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

The petitioner's statement of the case is substantially correct, as far as it goes. We desire, however, to call attention to certain additional facts which appear in the respondent's return, but which have been omitted from petitioner's statement (although some of these facts are referred to in his printed argument).

Of the fund which had been paid into the registry

of the court below by the defendants in the Morgan Jones equity case, the Court had ordered $95,770.00 retained in its registry for solicitors' fees and had retained jurisdiction of and reserved the cause for the purpose of ascertaining and determining the division between counsel of fees, as well as for other purposes.

This sum at first had been deposited by the clerk to the credit of the Court in the Subtreasury of the United States in St. Louis. At the suggestion of counsel for complainants and interveners, indicated in the decree as the persons who would be entitled to share in that fund upon its distribution, and pursuant to their stipulation, the fund was later, by order of the Court, transferred to State National Bank of St. Louis, which, pursuant to an order of the Court, entered of record on June 27th, 1917, furnished a bond with sureties to United States of America as obligee for $100,000.00, conditioned upon its paying over the sum deposited with it and interest, as agreed, in compliance with the order of the United States District Court. (Return, pp. 2 and 15, Exhibit "F"). The fund was not deposited by the attorneys in the case, but by the Court through its Clerk, and presumably to its credit, as required by law. The bond furnished by the bank was, until it was sent here with the return, in the custody of the United States District Court as part of its files.

On October 16, 1917, the petitioner herein not only

appeared in the court below and presented his intervening petition, as stated, but orally moved for leave to file the same. He presented no written motion for leave to file. The respondent, as Judge, however, permitted petitioner's counsel to argue orally the matter of his right to intervene at that time, as well as to argue in opposition to the motion of Anna E. Bomar to revive the cause by substituting her as a party and to permit her to enter her appearance as such substituted party, which had been filed on October 13, 1917, and copy of which had been served on petitioner (Return, p. 3).

The respondent did not then decide the matter of any of the motions, but permitted all parties and counsel for both Mrs. Bomar and the petitioner herein to file briefs in support of their respective contentions. Petitioner's counsel filed two briefs—one before, and the other after, ~~and in answer to~~ the brief filed on behalf of Anna E. Bomar, his second being a brief in reply to the argument for Mrs. Bomar and others (Return, p. 4; Exhibits "K", p. 29; "L", p. 37, and "M", p. 43), while his first was a brief in support of his alleged superior right to the fund as claimed in his intervening petition. Having heard all interested persons fully, the District Court then decided against the contention of petitioner as to his rights, and denied his motion for leave to intervene

by an order duly entered of record (Return, p. 4, Exhibit "X", p. 46).

The return not only shows the facts set forth in petitioner's statement of the case and the above facts, but also sets forth the fact that on November 7, 1917 (the date on which application for leave to file his petition for writ of *mandamus* was made herein), whatever authority Slater may have had in connection with Bomar's estate, if any, in Missouri, was revoked and terminated by the probate in Missouri of an authenticated copy of the will of David T. Bomar, deceased (Return, pp. 5 and 6), and the return also states that since the 7th day of November, 1917, the petitioner herein has not been in charge of any estate in Missouri of David T. Bomar, deceased, in the capacity in which he applied for and obtained leave to file his petition for a writ of *mandamus* herein.

Further facts are set forth from which it appears that Slater, on the day on which his authority was terminated, again assumed to take charge of the estate of David T. Bomar in Missouri, this time in the capacity of administrator *cum testamento annexo*. He filed notice with the Clerk of the St. Louis Probate Court that he had, in his official capacity, as Public Administrator, taken charge of the estate of David T. Bomar in Missouri as administrator *cum testamento annexo* on his own initiative; and then he as-

sumed to have this authority confirmed by a direction of the Judge of the Probate Court in vacation.

Prior to Slater's assuming to take charge of the estate under new authority, or to what is called by the petitioner his "re-appointment", the will of David T. Bomar had been duly probated in the court having jurisdiction of such matters at the place of the domicile of said decedent in Texas, and that Court had adjudged that there were no debts owing by him and that no further administration on his estate was necessary.

On November 19th, 1917, Anna E. Bomar, claiming in her individual capacity, to be entitled to whatever rights and assets her deceased husband had at his death, filed her motion to be substituted as a party claimant in the place of David T. Bomar, deceased, and in her motion claimed that by virtue of the decree adjudging that no administration was necessary upon the estate of her husband, the laws and statutes of the State of Texas and the terms of the will of David T. Bomar, deceased, all the right, title and interest of David T. Bomar in and to the fund in court, as well as to his rights and claims thereto, were vested absolutely in her as of the date of the death of David T. Bomar, deceased. And she further prayed to be recognized by the respondent's court as the absolute owner in her individual right of all rights or claims to the fund in court which

David T. Bomar had at his death, and to be substituted in her individual capacity as a party in his place and stead. The respondent, in his official capacity, after a hearing on her motion and upon consideration of proofs adduced in open court in support thereof, ordered that her motion be granted (Return, pp. 4 and 5, Exhibit "Q", p. 57); and on the same day Anna E. Bomar, in open court, adopted the pleadings, including the pending exceptions to the Master's report theretofore filed by or on behalf of David T. Bomar, deceased.

Thereafter, the order to show cause having come to the knowledge of respondent, further proceedings in the cause were postponed pending determination of the rule herein.

BRIEF OF ARGUMENT.

I.

The return shows that petitioner is not now entitled to the writ of mandamus.

1. The authority of the petitioner to act in the capacity in which he claims in his petition herein to be acting, was revoked and terminated prior to the date of the filing of his petition for *mandamus* (Return, pp. 7, 8, 59 and 60).

In re Estate of Brinckwirth v. Harry Troll, 266 Mo. 473;
R. S. Mo. 1909, Sec. 47.

2. Prior to the so-called "reappointment" of petitioner, title to the interest of David T. Bomar in the fund in court had vested in Anna E. Bomar (Return, pp. 4, 5, 54 and 55).

And this entitles her to appear as a party in the Morgan Jones case without local administration.

Morton v. Hatch, 54 Mo. 408;
Richardson v. Busch, 198 Mo. 174;
Bell v. Farmers & Merchants Bank, 188 Mo. App. 383.

3. Neither ~~is~~ do the second "taking charge", nor the

alleged confirmation thereof by the Judge of the Probate Court, invest Sater with the right to intervene to claim the fund.

Troll v. Landgraf, 183 Mo. App. 251;
Bell v. Farmers & Merchants Bank, 188 Mo. App. 383;
Richardson v. Busch, 198 Mo. 174;
R. S. Mo. 1909, Sec. 302;
Ex p. Wall, 84 Miss. 783;
Shold v. Van Treeck, 82 Neb. 99;
In the Matter of Horsefly Mining Co., 4 British Columbia 165.

II.

The action of respondent at the time it was taken was an exercise, but not an abuse, of his judicial discretion.

1. The interest claimed by petitioner is technical, not substantial, Mrs. Bomar being the real party in interest.

2. The granting or denying of permission to intervene is generally within the discretion of the lower court, and this case is not within any exception to that rule.

People v. Sexton, 37 Cal. 532;
Moon v. Welford, 84 Va. 34;
White v. U. S., 1 Black 501.

3. The question of whether Bomar's right had a

situs in Missouri was a judicial question with the determination of which by respondent this Court will not interfere by *mandamus*.

Lee v. Abdy, 17 Q. B. D. 309, 312;
Guillander v. Howell, 35 N. Y. 657, 661;
Jones v. Merchants National Bank, 76 Fed. 683;
Wilson v. Bell, 20 Wall (87 U. S.) 201, 22 L. Ed. 259.

4. The question of the authority of petitioner to take charge of Bomar's cause of action was a judicial question and the result reached by respondent was not an abuse of his judicial discretion.

III.

Mandamus can not be used to take the place of an appeal or writ of error, even though no appeal or writ of error is given by law.

In re Rice, 155 U. S. 396, 39 L. Ed. 198;
Crocker v. Supreme Court Justices, 208 Mass. 162, *l. c.* 164;
In re Key, 189 U. S. 84, 85.

ARGUMENT.

The case, as it now comes before this Court, presents an entirely different situation from that which was shown to the Court by the petitioner on his motion for leave to file his application herein.

Although it was a fact then known to the petitioner, he did not inform this Court that Anna E. Bomar, the widow of David T. Bomar, had been appointed temporary administratrix of the estate of David T. Bomar by the Court having probate jurisdiction at the place of the domicile of the deceased. Neither did he inform the Court that Mrs. Bomar, on October 13, 1917, had filed in the respondent's court a motion to revive the Morgan Jones cause in so far as it related to the matter of determination of counsel fees, by substituting her as a party thereto in the place of her deceased husband. Nor did he inform the Court that the matter of his oral motion for leave to intervene and Mrs. Bomar's motion to revive by substitution had been heard by the respondent as Judge, and that the Court below had determined that Mrs. Bomar and not the petitioner was the proper party to be substituted in the cause. All these facts appear in the return.

In passing upon the petitioner's motion to file his intervening petition, the Court had before it the proposed intervening petition. Petitioner's counsel

argued fully his right to claim the fund. This appears from the two briefs which he prepared and was permitted to file in the court below (Exhibits "K" and "M" to the return). A reading of those briefs will show that the Court had before it and passed upon every claim which the petitioner is now urging in support of his right to be substituted in the cause for the deceased David T. Bomar, and the respondent, in his official capacity, passed upon those questions and decided that the St. Louis Public Administrator was not then entitled to intervene, but that Anna E. Bomar had the better right, and she was accordingly substituted.

The revival of the cause in the name of Anna E. Bomar and her substitution therein, as well as the showing that Anna E. Bomar, since then has again been substituted in her individual capacity as the party entitled to all of the rights of David T. Bomar in the fund, takes out of the case the suggestion which must have been conveyed by petitioner's counsel to this court, that the action of the respondent was such as to cause the loss to the persons beneficially entitled thereto of their interest in the fund in court, and if the petitioner was still in a position to claim in the capacity in which he sued out his rule to show cause herein, the question before the Court would be whether the denial of his right to intervene and to claim the fund, and the finding in favor of the person

ultimately interested in the estate of David T. Bomar would be ground for the issuance of the writ sought.

However, the petitioner is not now able to appear in the cause in this court in the capacity in which he came into it, for the reason that his authority was revoked on the same day on which he made application for leave to file his petition for writ of *mandamus* and before leave to file was granted to him.

Under the law of Missouri, the authority of a Public Administrator or of any other administrator to administer an estate is automatically revoked by the probate of a will of the decedent upon whose estate he is or claims to be administering.

In the case of *In re Estate of Brinckwirth v. Harry Troll, Public Administrator*, 266 Mo. 473 (1916), the Supreme Court of Missouri has so held. In the course of its opinion the Court said:

> "* * * His appointment as such administrator or rather his assumption of authority under the statute to act as such, was conditional, which depended upon the subsequent discovery and probate of the will referred to in said Section 47; and when that contingency happened his right to further administer the estate under Section 305 ceased *ipso facto*, and he could proceed no further therewith, for the obvious reason from that time on the estate had to be administered according to the terms of the will and not according to any statute, and before that could be done letters testamentary or of administration

with the will annexed had to be issued by the Probate Court before anyone could lawfully proceed further with the administration. * * *

"While the Probate Court of the City of St. Louis has, as a matter of form, or probably for the purpose of making its record fair upon its face, made the useless order revoking the authority of the appellant to proceed further with the administration of the estate after the probate of the will, **yet it is perfectly clear that no such order of revocation was necessary**, for the reason before stated, that when the will was probated, then by operation of said Section 47, his authority to further act ceased *ipso facto*." (Black type ours.)

The petitioner, here, set out in his petition in detail his acts under the statute and the acts of the St. Louis Probate Court under which he claimed the right to be made a party to the proceedings in the Morgan Jones case, and under which he claimed to have standing in this court to file his petition for *mandamus*. He claims first, that he had "taken charge of the estate of the said Bomar in Missouri in his official capacity and under his official bond" by filing a notice in the office of the Clerk of the Probate Court on the 26th day of September, 1917, and that on the 5th day of October, 1917, the St. Louis Probate Court had directed him to take charge and possession and administer upon the estate of the said deceased in the City of St. Louis, Missouri. It was upon these facts

that he based his right in the court below. It was upon these same facts that he based his right here. But, on the very day on which he asked this Court to permit him to file the petition in this cause and before leave to file was granted or the petition filed, all of the authority under which he had claimed, had been revoked and his connection with the estate of David T. Bomar, if any there was in the State of Missouri, terminated.

But it is urged that Frank M. Slater has been "reappointed" and that, although he is no longer administrator by virtue of the authority under which he previously claimed, he is still merely the administrator of the same state and that his relationship to the estate is not altered, nor his right to administer is abridged. It is not true that the only change is a change in the name of his relationship to the estate. His present right to administer, if any, dates not from the day of his original "taking charge" of the estate, nor from the date when he was first ordered by the St. Louis Probate Court to take charge. His rights, if any, now date from November 7th, and not from September 27th, or October 5th, 1917. Neither are the persons who will be ultimately entitled to the estate of David T. Bomar the same under the new authorization under which he is claiming as they were before. Moreover, it does not necessarily follow that his right to administer is valid under his "re-

appointment", even if it would have been valid had his old relation to the estate not been terminated. In fact, it is our view that since the probate of the will of David T. Bomar in Texas on November 6th, and the judgment of the Texas Court closing the administration on the estate, that the title to whatever choses in action, and whatever right to obtain part of the fund in court involved in the Morgan Jones case David T. Bomar had, became vested in Anna E. Bomar individually and in her own right, and that consequently there remained no assets of the estate in Missouri which could be administered on by the petitioner or anyone else, and no assets belonging to the estate, in Missouri, and therefore the Probate Court of St. Louis could have no jurisdiction, since it is conceded that its jurisdiction is not founded on the presence of any physical or tangible assets within Missouri.

It seems to us, therefore, that the facts set out in the return showing that the petitioner is not now and has not since November 7, 1917, been acting or authorized to act in the capacity in which he sued for the writ of *mandamus*, are of themselves sufficient, without more, to require that the motion for the issuance of a peremptory writ of *mandamus* notwithstanding the return, be denied.

It is elementary that a writ of *mandamus* will not be issued to require a Court to do something for

which there has not been a previous request. Nor will the writ issue to determine abstract or moot questions. If this Court should order the respondent to permit the petitioner to file the intervening petition which he offered to the Court below, nothing will be accomplished but the decision of a moot question, for it is clear that he can no longer establish the facts which he set up in that petition, his authority having been revoked. On the other hand, if this Court should order the respondent to permit the filing of a similar intervening petition by Frank M. Slater, as administrator *cum testamento annexo*, under his new authority setting up the facts which he now claims entitle him to intervene in the Morgan Jones case, it would order the respondent to do an act which he has never been requested, and which he has never refused to do. Moreover, the petitioner is not now entitled to intervene in the Morgan Jones case.

When the will of David T. Bomar was probated in Texas and administration on his estate closed there, Mrs. Bomar became, under the laws of Texas, as well as under the laws of Missouri, the owner of whatever property or rights belonged to Bomar at the time of his death, including personal property, if any, situated in the State of Missouri.

Under Article 3235, Texas Civil Statutes, 1914, property vests in legatees, devisees or heirs at-law on

the death of any person, and under that law, his executors or administrators have merely a right of possession and do not take title. But, even if this were not so, administration in Texas having been closed, the personal property of the decedent under the laws of Texas became vested in the legatee under his will. And under the decision in *Morton v. Hatch*, 54 Mo. 408, it is held in Missouri that such a legatee may, after the close of administration in the foreign state, sue in the State of Missouri, even for local assets, without local administration. The Court below was, therefore, clearly right in permitting Mrs. Bomar to be made a party in her individual capacity on November 19th.

But if this Court desires to go into the question of whether the action taken by the Court below, with reference to the motion for permission to intervene, and the original intervening petition of Slater, administrator, was an abuse of judicial discretion, we respectfully submit that it was not such an abuse. It was manifest to the Court below, as it must be clear to the Court here, that at the time the intervening petition was presented and now, the only interest of the Public Administrator is to have an opportunity to collect a fee of five per cent and attorney's fees, which, by law, he will be entitled to collect from estates passing through his hands. It was not claimed below that there were any debts due in Missouri, and

the claim that there is a debt due the State of Missouri for inheritance tax was not urged before and is immaterial now.

The statement that there is a debt due the State of Missouri assumes that Missouri is the *situs* of Bomar's right to the fund in court, and this is one of the judicial questions which was for the determination of the Court below. At any rate, a reference to the brief filed below by counsel for petitioner will show that no such claim was made in the Court below, but counsel relied upon an alleged presumption that there were debts in the state (Brief, p. 35).

Nor is it shown that his distributive share of the fund was large enough to make the inheritance taxable. And even if the situation was such that an obligation for inheritance taxes ever arose, it is not shown that it was not paid—a question of fact for the Court below. And besides, there is nothing to prevent the state from asking to be made a party for the purpose of asserting its lien, if any, in the Federal Court, which is administering on the fund in court.

We think it elementary and unnecessary to discuss the proposition apparently conceded by petitioner, that *mandamus* does not lie to compel the Court below to decide a matter before it in a particular way, nor to review its judicial action had in the exercise of its legitimate jurisdiction.

Nor is it necessary to review authorities to establish

the rule that allowing or denying permission to become a party is generally deemed discretionary in the trial court, and that the motion for leave to intervene in an action at any stage of an equity proceeding presents a judicial question so that the ruling made thereon, even though erroneous, is not reviewable by *mandamus*. The only exception to the general rule found in the decisions is in cases where the Court below refused to permit an intervention or substitution of parties on the ground of lack of jurisdiction.

The facts in the case at bar do not bring it within that exception. The Court below did not refuse to act; it took jurisdiction, and decided that Mrs. Bomar and not the petitioner, was the proper party to be substituted for David T. Bomar. The cause of action, therefore, will not be lost, as the person ultimately and beneficially entitled to share in the fund is in court and in a position to protect her rights.

The case is not one like *in re Conaway*, 178 U. S. 421, cited by petitioner. That was an action at law in which one of the defendants had died before service of summons was had on him. The plaintiff suggested the death of defendant and obtained a writ of *scire facias* against his executor, but, on motion, the Court set the same aside. Then the Court made an order substituting the executor as a party and ordered an alias summons issued against him. On motion the

lower court set aside its order of substitution and quashed the alias summons on the ground that the action had abated on the death of the defendant before service of the original summons was had. The case, therefore, was one in which the writ of *mandamus* was granted to compel the lower court to take jurisdiction.

But counsel for petitioner contend that it is never within the discretion of a Court which has a fund for distribution to refuse to permit any person to become a party for the purpose of claiming a share in the fund. We quote from their brief:

> "We furthermore contend that where a fund is in court and a party not already upon the record desires to advance his claim to a portion of it and have it adjudicated, he has a certain right to come in, and that the refusal to admit him as a party in such a case is an error, subject to correction by the writ of *mandamus*. It was so held in *Wood v. Lewanee, Circuit Judge*, 84 Mich. 521, and in effect at least by this Court in the Connaway case, 178 U. S. 421."

As has just been shown, the *Connaway* case is not authority for the proposition for which it is cited. It had nothing to do with the case of a fund in court and was within the general exception, because it was a case in which the lower court had refused to act on the ground of lack of jurisdiction.

The case of *Wood v. Lewance, Circuit Judge*, 84 Mich. 521, is merely another example of the correction by the writ of *mandamus* of the error of the lower court in refusing to take jurisdiction, and was put on that ground by the Court which issued the writ. The Court in that case was also doubtless influenced by the fact that a refusal to permit a *mandamus* by substitution of party plaintiff in the case would result in the right of action being wholly lost.

Nor is there support in the cases for the proposition that judicial discretion will be controlled by *mandamus* where upon the face of an application for admission into pending litigation a *prima facie* right to litigate appears. In other words, it is our position that, even thought a higher court might hold that the right to be admitted as a party appears upon the face of an application therefor, it will not review the action of a lower court which, after hearing, has decided that the other of two claiming parties is the proper one to be admitted. The lower court has jurisdiction to make a mistake as to which is the proper party and that jurisdiction will not be interferred with by *mandamus*.

When the Court passed upon petitioner's motion for leave to intervene, it performed something more than a mere ministerial function. It was acting in the exercise of purely judicial functions. It had before it not merely the statement of facts which appeared

in petitioner's intervening petition which he presented to the Court with his motion for leave to intervene, but it had before it the record of the case up to that time, including the motion of Anna E. Bomar to be substituted, as well as the application of the Messrs. Thompson for a writ of *scire facias* to be directed to the petitioner. The question, among others, arose as to the *situs* of and title to the fund in court and of the *situs* of Bomar's right or claim to participate in its distribution. This certainly was a judicial question. If Bomar's claim to the fund had no *situs* in Missouri, then Slater, even under the order of the Probate Court, could have no claim or right to this fund, because the direction of the Court was "to take charge and possession and administer upon the estate of the said deceased in the *City of St. Louis, Missouri*" (Return, p. 28). And, for the additional reason that the fund was not subject to loss, waste or destruction, he could not take charge thereof on his own initiative. To deny the Public Administrator the right to come into the respondent's court to claim the fund was not, therefore, a collateral attack upon his authority. It was a decision of a question of law and fact as to whether a particular item of an estate, which the Public Administrator was claiming, was one which had come into his possession and jurisdiction or not, and was purely a judicial question.

The petitioner's counsel admit that the question

thus presented as to *situs* is novel, but say that it is by no means, one on which there is no authority (Petitioner's Brief, p. 22). According to petitioner, the case of *United States v. Tyndale*, 116 Fed. 820, is the only case on the subject. But that case was not conclusive upon the court below in the case at bar. It is to be noted, first, that the case cited was a contested case only on the proposition of the right of the United States to claim the fund, but was uncontested so far as the Public Administrator's right was concerned; second, the property out of which the fund arose was tangible and physical property belonging to the deceased and brought into the State of Massachusetts, after the death of the deceased, and before it came into the hands of the Federal Court; and, thirdly, it appeared that the residence of deceased was unknown. Furthermore, the Court in that case qualified the proposition which it laid down that a fund in the registery of a Federal Court is a fund in each and every county in the following language: "Unless there is some restriction in a particular case growing out of some special matter, *as for instance, the residence of the deceased* or the priority of application to some particular Probate Court".

It would not, therefore, be an abuse of judicial discretion for the respondent to have decided that the *situs* of Bomar's right to the fund was not in Missouri. And, if it was not in Missouri, then under the

decision of the case of *Richardson v. Busch*, 198 Mo. 174, a refusal to recognize the right of a public administrator to take charge of the same is not collateral attack.

In the case just mentioned in a suit brought by the public administrator for conversion, the Supreme Court of Missouri refused to recognize his right to take charge of assets consisting of shares of stock of a Michigan corporation, the owners of which lived in Massachusetts, but the certificates of which were in Missouri, saying:

> "If the property is not here so that it can be reached by the process of a court of general jurisdiction, how can it be taken hold of by a court of limited jurisdiction?"

The case of *Bell v. Farmers & Merchants Bank*, 188 Mo. App. 383, decided by the St. Louis Court of Appeals in 1915, also holds that the determination by a court of equitable cognizance that an administrator is not entitled to possession of property which had belonged to the deceased and which had been divided up among the heirs without administration is not a collateral attack upon the authority of the administrator. It is interesting to note also that the *Bell* case holds that the Missouri Collateral Inheritance Tax is not a debt of or claim against the estate as

such, so as to require administration of property in the State of Missouri belonging to the deceased.

Nor is the fact that the money which the Court had in its registry was deposited in a bank in the State of Missouri, determinative of the question of the *situs* of Bomar's claim. The fund in question is no more within the jurisdiction of the public administrator in Missouri, nor of any Probate Court in Missouri, because it happens to be deposited in a bank in the state, than if it had always remained in the personal custody of the Court's immediate officials.

The case of *Jones v. Merchants National Bank*, 76 Fed. 683; 22 C. C. A. 483; 35 L. R. A. 698 (1896), was one in which Jones filed a bill against the bank in which funds of the court had been deposited and against the clerk of the court which had deposited the funds, claiming title to the funds. After a decree for defendants, the complainant appealed. In affirming the decree the Court said:

> "There can be no doubt that the deposit made in that bank, and in controversy in two of these appeals, must be regarded as made under the direction of the Circuit Court pursuant to the requirements of the statute and it must be treated as the funds of the court as fully as though it were in the personal possession of the clerk, and therefore subject in all respects to its summary control and disposition and entitled to protection

> in all particulars, in order that it may be free at all times for such disposition. Any interference with it or with the bank where it is deposited, or attempt thereto which would embarrass in any degree such control or disposition or harrass the bank or put it to expense by reason of its possession of the fund, unless the consent of the Circuit Court was first obtained, would amount on plain propositions of law to an implied contempt, and if persisted in understandingly, to an actual one."

It will be seen, therefore, that neither the Probate Court nor the petitioner had any jurisdiction over the fund in question, nor over Bomar's right to share in distribution thereof, and yet, according to the order of the Probate Court, its jurisdiction was based upon an "estate in the City of St. Louis, Missouri, consisting of an interest in a sum of money now on deposit in the State National Bank of the City of St. Louis" (Rec., p. 28).

It was shown to the District Court that there were no assets of David T. Bomar in the State of Missouri other than the fund in that court. It was perfectly proper, therefore, for it to ignore the order of the Probate Court directing Slater to take charge of assets in Missouri, at least in so far as that order pertained to the fund in court.

Nor did Slater have any right, under his original notice that he had "taken charge". The case of *Troll*

v. Landgraf, 183 Mo. App. 251 (St. Louis Court of Appeals, 1914), clearly decides this proposition. That case holds that the Missouri statute excludes the public administrator from taking charge in any case other than those mentioned in the statute. In that case there was no question but that the *situs* of the property, of which he had assumed to take charge, was in the State of Missouri. Among the assets of the estate of Joseph Landgraf, a resident of Illinois, who died there in 1910, were debts due from persons residing in Missouri, payable in Missouri and secured by deeds of trust on real estate in Missouri. Prior to the approval of final settlement in Illinois the public administrator in St. Louis filed notice that he had taken charge. *Held*, that upon the record the property was not exposed to loss or damage and consequently the public administrator was nothing but an officious intermeddler.

Speaking of the office of Public Administrator, the Court in that case said (page 257):

> "And manifestly it was not intended that such officer should have the power or authority to take into his possession property belonging to foreign testators or intestates, except under the conditions plainly set forth in the statute."

It was urged in that case, as it was before the respondent, that the personal property of the foreign

intestate passed to the ancillary administrator and that the title thereto could be received only through the latter. On this point the Court said:

> "As to this it may be said that those beneficially interested therein have the equitable title thereto. And the courts in this state (to say nothing of like cases in other jurisdictions) have in many instances, recognized the right of distributees to take title to personal property even though no administration be had."
>
> " * * * It would appear to be altogether unreasonable to suppose that the law contemplates that the Public Administrator must be permitted to take charge of assets of an estate upon the theory merely that they have a technical legal *situs* in this state against the wishes of those interested, and where he would in truth be nothing but a naked passive trustee, with no duty to perform except to take property into his possession, hold it during the period of administration, and then turn it to those who are rightfully entitled to it, less his fees and expenses.
>
> "It can not be that the law contemplates that foreign administration of this sort, ancillary in character, may be enforced upon those interested in an estate, against their will, when, as here, no necessity has arisen therefor. And we think it altogether clear that our statute has purposely limited and restricted the authority of the Public Administrator so as to prevent this very thing."

It is clear, therefore, that the respondent was acting

within his jurisdiction when he determined that the fund in Court and under his control was not subject to loss, waste or destruction, and that the act of the Public Administrator in taking charge was merely an intermeddling, and that therefore he need not be recognized as a claimant to the fund in court.

But it is urged that this is a matter which only the Probate Court can decide, and that the action of the Public Administrator is not open to "collateral attack", but must be attacked directly, as was done in the case of *Troll v. Landgraf*, just cited.

It can not be that the District Court of the United States, in its disposition of a fund under its control, is bound by the decision of an administrative officer in assuming to take charge of an estate. Certainly it was within the jurisdiction of the Court below to hold that the determination of the Public Administrator that the fund was subject to loss, waste or destruction, was not conclusive or binding upon the Federal Court, and it can not be said that such a decision was an abuse of judicial discretion. The decision of the Public Administrator as to his own right to act is not a judgment of a court of general jurisdiction, and is subject to attack collaterally as well as directly.

If we are correct in our contention that the interest of David T. Bomar was an interest in a fund in a Federal Court, and therefore not the subject of administration in Missouri, then it becomes immaterial

whether Mrs. Bomar be regarded as the administratrix of the estate of her deceased husband or as the sole legatee under his will, and the present sole owner of this interest. In either capacity she might appear in the Federal Court and protect the rights formerly owned by her husband. Her right to appear as administratrix is clear from the case of *Purple et al., Administrators, v. Whitlead*, 49 Vermont 187 (1876).

In that case Massachusetts administrators were permitted to sue in Vermont in their representative capacity, and the Court based its decision on the fact that the asset which those administrators were seeking to recover was an asset which was not the subject of administration by the Probate Court in Vermont.

The general doctrine announced in the many cases cited by petitioner's counsel to the effect that an administrator is incapable of maintaining a suit in a foreign jurisdiction is not a rule of universal application, but is subject to the limitations thereon arising from the reason for the rule.

The argument is advanced that because the petitioner has no right of appeal from the order denying him leave to intervene, it necessarily follows that he is entitled to the writ of *mandamus*. This is a pure *non sequitur*. It may well be that the petitioner has not the right of appeal and still is not entitled to the writ of *mandamus*. *Mandamus* can not be used to take the place of an appeal, even though no appeal or

writ of error is given by law. *Re Rice, Petitioner*, 155 U. S. 396; 39 L. Ed. 198 (1894). The cases cited and the argument based on the point that no appeal lies from the order of respondent are therefore immaterial.

The case presented on the whole record, therefore, is one in which no abuse of discretion by the lower court appears. It is a case which does not call for the issuance of a writ of *mandamus*, which is a discretionary writ, because it appears that the writ is not necessary to serve the ends of substantial justice. Every party who has any lawful right to participate in the ultimate distribution of this fund, or who has claimed such a right, has been admitted and recognized by the Court below for the purpose of protecting their interests. The jurisdiction of the Court below to administer upon the fund in court is complete and adequate without the necessity of intervention by an officer of the State of Missouri, and that fund in the hands of the Federal Court is not subject to the jurisdiction of any officer or court of the State of Missouri. We respectfully submit that Mrs. Bomar should be permitted to protect and to receive upon distribution the interest which has legally devolved

upon her, and that this Court should not commit that interest to the hands of her adversary in this controversy.

Respectfully submitted,

DANIEL G. TAYLOR,

JACOB CHASNOFF,

GEORGE C. WILLSON,

Counsel for Respondent.

EX PARTE SLATER, PUBLIC ADMINISTRATOR, ETC., PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 27, Original. Argued January 21, 1918.—Rule discharged March 4, 1918.

A petition for mandamus should give a correct, uncolored statement of the matter concerning which it seeks relief.

The function of mandamus, when directed to judicial officers, restated.

The right of substitution, upon the death of a party to a suit in the District Court, depends upon recognized legal and equitable principles to be judicially applied; and where, after due hearing, the motion is denied, the ruling, if erroneous, may be corrected upon appeal, but it cannot be reviewed by mandamus.

By decree in a pending suit, the District Court directed that a sum in

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the registry be distributed among several solicitors in proportion to their respective services in the case, past payments to be considered, and retained control of the suit and fund to make and carry out the apportionment. *Held*, that the death of one of the solicitors suspended the proceedings until someone legally capable of asserting and defending his interest could be substituted.

Substitution, formerly effected by a bill of revivor, or a bill of that nature, is now ordered upon motion under new Equity Rule 45.

Petition dismissed.

THIS is a petition for a writ of mandamus against the judge of the District Court for the Eastern District of Missouri directing the revivor in the petitioner's name of a suit in equity. The facts, about which there is no dispute, are these: In 1916 the District Court by a decree in a pending suit awarded $95,770, then in the registry of the court, to five solicitors as the balance due to them collectively for services in the suit, and directed that this sum be apportioned among them according to the relative amount and value of the services of each, due regard being had for payments already made. Control of the suit and fund was retained to enable the court to make the apportionment and carry it into effect. The solicitors appeared in the suit and while proceedings looking to an apportionment were pending one of the solicitors died. He was a resident of Texas and was survived by a widow and son, both living in that State. By his will, regularly presented for probate in Texas, his entire estate, excepting one dollar bequeathed to the son, was devised and bequeathed to the widow, and she was named as sole executrix. The will was what is known under the laws of Texas as an "independent" will, the same containing a direction that no action should be had thereunder other than to probate it and to return an inventory and appraisement. See Tex. Civ. Stats., 1914, Art. 3362, *et seq.* After the will was presented and while it was awaiting probate in regular course the court in Texas appointed the widow

temporary administratrix and directed her in that capacity to take charge of the estate and do whatever was necessary to obtain the deceased's portion of the fund awaiting distribution in the District Court. She qualified as temporary administratrix and as such presented in the suit a motion asking that it be revived by substituting her as a party in the place of the deceased. A few days later the public administrator of St. Louis, Missouri, acting under an order of the probate court of that city, presented in the suit a motion, erroneously styled an intervening petition, asserting that he was the deceased's only legal representative in Missouri and insisting in effect that the revivor be in his name.

These conflicting motions were heard together, were argued orally and in elaborate briefs by counsel for the respective applicants for substitution, and were considered in a memorandum opinion wherein the judge, after indicating that a revivor was essential and that the question for decision was as to which of the two applicants was the proper party to be substituted in the place of the deceased, reached the conclusion that the revivor should be in the name of the widow as temporary administratrix. An order was accordingly entered granting her motion and denying that of the public administrator. That order was dated October 29, 1917.

November 6, 1917, the will was regularly admitted to probate in Texas, and the judgment by which this was done contained an express finding that there was no debt to be paid and no occasion for administration upon the estate. The widow then presented in the suit a motion setting up the probate of the will with the finding made in that connection and insisting that this and the terms of the will operated under the laws of Texas [1] to invest

[1] The reference evidently was to Article 3362, *supra*, and to Article 3235, which declares, "When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immedi-

her in her individual capacity with the full right, title and interest of the deceased in the fund as of the date of his death. The motion concluded by asking for an order recognizing and substituting her in her individual right as the successor in interest and title of the deceased. A hearing was had upon this motion and the same was granted November 19, 1917.

That was the date on which this court, after examining the present petition of the public administrator, granted leave to file the same and ordered that a rule to show cause issue against the defendant judge.

Mr. George E. Webster, with whom *Mr. Wells H. Blodgett*, *Mr. Henry W. Blodgett* and *Mr. Walter N. Fisher* were on the briefs, for petitioner:

The peremptory writ of mandamus should issue as prayed because the petitioner has no remedy by appeal. *In re Connaway*, 178 U. S. 421; *Guion* v. *Liverpool Ins. Co.*, 109 U. S. 173; *Ex parte Cutting*, 94 U. S. 14; *Ex parte Russell*, 13 Wall. 664; *Life and Fire Ins. Co.* v. *Wilson*, 8 Pet. 291. The order denying his application for leave to intervene is not such a recognition of his status as a party to enable him to appeal. *Ex parte Cutting, supra.*

The interest of the decedent in the undistributed fund constituted assets subject to administration in Missouri. *United States* v. *Tyndale*, 116 Fed. Rep. 820.

The mere fact that in denying the petitioner's application for leave to file an intervening petition the respondent was acting judicially does not defeat a resort to mandamus. *In re Connaway, supra; Ex parte Breedlove*, 118 Alabama, 172; *Reynolds* v. *Clark*, 95 Alabama, 570; *Wood* v. *Lewanee*, 84 Michigan, 521; Merrill, Mandamus, § 186. Where a

ately in the devisees or legatees," but shall be "subject in their hands to the payment of the debts," if any, of the testator. And see *Wilkins* v. *Ellett*, 108 U. S. 256, 258; also *Owings* v. *Hull*, 9 Pet. 607, 625, and *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751.

person desires to intervene to lay claim to a fund in court and shows a *prima facie* right, the refusal to admit him as a party is an abuse of discretion which may be corrected by mandamus.

Mr. Jacob Chasnoff, with whom *Mr. Daniel G. Taylor* and *Mr. George C. Willson* were on the brief, for respondent:

The interest claimed by petitioner is technical, not substantial, the widow being the real party in interest.

The granting or denying of permission to intervene is generally within the discretion of the lower court, and this case is not within any exception to that rule. *People* v. *Sexton*, 37 California, 532; *Moon* v. *Welford*, 84 Virginia, 34; *White* v. *United States*, 1 Black, 501.

The question of whether the claim of decedent had a *situs* in Missouri was a judicial question with the determination of which by respondent this court will not interfere by mandamus. *Lee* v. *Abdy*, 17 Q. B. Div. 309, 312; *Guillander* v. *Howell*, 35 N. Y. 657, 661; *Jones* v. *Merchants National Bank*, 76 Fed. Rep. 683; *Wilson* v. *Bell*, 20 Wall. 201.

The question of the authority of petitioner to take charge of the cause of action was a judicial question and the result reached by respondent was not an abuse of his judicial discretion.

Mandamus cannot be used to take the place of an appeal or writ of error, even though no appeal or writ of error is given by law. *In re Rice*, 155 U. S. 396; *Crocker* v. *Supreme Court Justices*, 208 Massachusetts, 162, 164; *In re Key*, 189 U. S. 84, 85.

Mr. Justice Van Devanter, after making the foregoing statement, delivered the opinion of the court.

It now appears that the petition gives an inadmissible coloring to the matter in respect of which it seeks relief. We say this because the petition implies that the court

did not consider but summarily rejected the public administrator's motion for a revivor in his name, whereas in fact the court heard oral argument on the motion, gave time for filing and received briefs thereon, and ultimately denied the motion for reasons given in a memorandum opinion. The petition makes no reference to this; neither does it mention the conflicting motion by the temporary administratrix which was heard at the same time, dealt with in the same memorandum opinion and granted by the same order that denied the public administrator's motion. These matters and the subsequent proceedings are all brought to our attention by the return, the accuracy of which is not questioned.

When the unwarranted coloring of the petition is put aside and what actually was done is considered in its true light, it is manifest that the situation is not one in which a writ of mandamus will lie.

Of course, the death of one of the parties having an interest in the fund operated to suspend the proceedings for its apportionment until some one legally capable of asserting and defending that interest should either come or be brought into the suit in the place of the deceased. Formerly such a substitution was effected through a bill of revivor or a bill of that nature, 210 U. S. 526, Rule 56; Story's Equity Pleadings, 9th ed., §§ 354, 356, 364; but the new Equity Rules provide that the court may, "upon motion, order the suit to be revived by the substitution of the proper parties." 226 U. S. 661, Rule 45. Whether a particular applicant for substitution is the proper party is a question for the court to determine, just as is the question whether a particular suit is brought by or against the proper party. In either case the question is to be resolved by applying recognized legal and equitable principles to the facts in hand; in other words, by an exercise of the judicial function. If the suit be one which may be revived, as where the cause of action or claim in contro-

versy survives, revivor in the name of the proper party is a matter of right, and, if it be denied, the denial may be reviewed and corrected upon appeal. *Clarke* v. *Mathewson*, 12 Pet. 164; *Terry* v. *Sharon*, 131 U. S. 40, 46; *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315–316; *Mackaye* v. *Mallory*, 79 Fed. Rep. 1, 2; *Minot* v. *Mastin*, 95 Fed. Rep. 734, 739; *United States Trust Co.* v. *Chicago Terminal Co.*, 188 Fed. Rep. 292, 296; *Western Union Telegraph Co.* v. *United States & Mexican Trust Co.*, 221 Fed. Rep. 545, 552.

When the two conflicting motions for revivor were presented it devolved upon the court to consider and decide which, if either, of the applicants was entitled to substitution. A full hearing was had and in regular course the court ruled that one applicant was and the other was not the proper party, and then entered an order reviving the suit accordingly. That was a judicial act done in the exercise of a jurisdiction conferred by law, and even if erroneous, was not void or open to collateral attack, but only subject to correction upon appeal.

"The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal." *Ex parte Roe*, 234 U. S. 70, 73; *In re Rice*, 155 U. S. 396, 403; *In re Key*, 189 U. S. 84; *Ex parte Park Square Automobile Station*, 244 U. S. 412.

Upon the present petition therefore we cannot consider the merits of the ruling upon the conflicting motions or the relative bearing of the subsequent proceedings whereby the widow in her individual right was substituted as the successor in interest and title of the deceased.

Rule discharged; petition dismissed.